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✓FEDERAL PROCEDURE AT LAW

A TREATISE ON THE PROCEDURE IN

SUITS AT COMMON LAW

IN THE

CIRCUIT COURTS OF THE UNITED STATES

ACCOMPANIED WITH, AS A
BASIS OF FEDERAL JUDICIAL PROCEDURE,
A STATEMENT OF THE DUAL SYSTEM OF GOVERNMENT
CREATED BY THE FEDERAL CONSTITUTION AND THE CONSTITUTIONAL
LIMITATIONS IMPOSED UPON THE STATE AND FEDERAL GOV-
ERNMENTS AND THE CREATION OF THE FEDERAL
JUDICIAL SYSTEM AND THE JURISDICTION
OF ALL THE FEDERAL COURTS

By C. L. BATES

OF THE BAR OF SAN ANTONIO, TEXAS

(AUTHOR OF BATES' FEDERAL EQUITY PROCEDURE)

In Two VOLUMES

VOLUME I

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STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

To the Honorable

ALBERT H. WHITFIELD,

Chief Justice of the Supreme Court of the State of Mississippi,
a jurist of broad and profound learning, an orator of matchless
eloquence, a patriot, pure and simple, a votary of constitutional
government, and a Christian gentleman of scholarly attainments,
this work is respectfully dedicated, as a tribute of respect, at-
tachment and esteem.

PREFACE.

The purpose of this work is to state the principles controlling the judicial procedure in suits at common law, in the circuit courts of the United States. There are inherent difficulties in the subject, resulting from the complex basis of that procedure, there being four distinct sources from which its rules and principles are derived, namely, (1) the federal constitution, (2) the English common law, (3) the federal statutes, and (4) the state procedure. The act of conformity adopts the state procedure only "as near as may be"—consistently with the federal constitution and valid laws of the United States.

The great outlines of federal procedure are laid in the constitution, and cannot be overridden by acts of congress adopting state procedure. Among the rights secured by those constitutional provisions is the right to a trial, in suits at common law, by a jury, as that right existed at common law. The federal government is the only government on this continent preserving that right in its full integrity. The states are, in many insidious ways, breaking away from this great guaranty of life, liberty and property—this great fundamental principle of Anglo-Saxon civilization. The jurisdiction, both original and appellate, of the several courts of the federal judicial system, and the nature and character of the judicial remedies and procedure established and pursued in them, arise out of and are limited by the nature of the dual system of government created by the federal consti-

tution, the relations existing between the federal and state governments, the constitutional powers of each, respectively, and the limitations imposed upon each of them by the fundamental law, and, therefore, a comprehensive knowledge of the entire scheme of government is absolutely essential to an accurate knowledge and full comprehension of federal jurisdiction and procedure in all their branches and details; and, for this reason, the author has, as a basis of the discussion of Federal Procedure at Law, assayed a statement of the Dual System of Government established by the constitution, the constitutional limitations of the state and federal governments, the judicial power of the federal government, the creation of the federal judiciary, the jurisdiction of all the courts of the system, and the distinction between law, equity and admiralty, and the remedies appropriate to each, as maintained in the federal courts. An effort has been made to define suits at common law, and to point out and particularly specify the particulars in which the federal courts will, and in which they will not, conform to state procedure in suits at common law.

The work has been written in the hope that it may supply an additional aid to the working lawyer and also to the earnest student of American institutions, and is respectfully submitted to the kindly judgment of the American bench and bar.

C. L. BATES.

San Antonio, Texas, June 1, 1908.

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MAGNA CARTA.

MAGNA CARTA.

SEU

CARTA DE LIBERTATIBUS REGIUS JOHANNES.

CONCESSIS DIE JUNII QUINTO DECIMO, A. D. 1215, IN ANNO
REGNI SEPTIMO DECIMO.

[Johannes Dei gratia rex Angliae, dominus Hyberniae, dux Normanniae et Aquitanniae, comes Andegaviae, archiepiscopis, episcopis, abbatibus, comitibus, baronibus, justiciariis, forestariis, vicecomitibus, praepositis, ministris et omnibus ballivis et fidelibus suis salutem. Sciatis nos intuitu Dei et pro salute animae nostrae et omnium antecessorum et haeredum nostrorum, ad honorem Dei et exaltationem sanctae ecclesiae, et emendationem regni nostri, per consilium venerabilium patrum nostrorum, Stephani Cantuariensis archiepiscopi totius Angliae primatis et sanctae Romanae ecclesiae cardinalis, Henrici Dublinensis archiepiscopi, Willelmi Londoniensis, Petri Wintoniensis, Joscelini Bathoniensis et Glastoniensis, Hugonis Lincolnensis, Walteri Wygornensis, Willelmi Covetrensis, et Benedicti Roffenis episcoporum; magistri Pandulfi domini papae subdiaconi et familiaris, fratris Eymerici magistri militiae templi in Anglia; et nobilium virorum Willelmi Mariscalli comitis Pembrok, Willelmi comitis Saresberiae, Willelmi comitis Warrenniae, Willelmi comitis Arundelliae, Alani de Galweya, constabularii Scotiae, Warini filii Geroldi, Petri filii Hereberti, Huberti de Burgo senescalli Pictaviae, Hugonis de Nevilla, Mathei filii Hereberti, Thomae Basset, Alani Basset, Philippi de Albinaco, Roberti de Roppelay, Johannis Mariscalli, Johannis filii Hugonis et aliorum fidelium nostrorum:]

1. In primis concessisse Deo et hac praesenti carta nostra confirmasse, pro nobis et haeredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et lib-

ertates suas illaesas; [et ita volumus observari; quod apparet ex eo quod libertatem electionum, quae maxima et magis necessaria reputatur ecclesiae Anglicanae, mera et spontanea voluntate, ante discordiam inter nos et barones nostros motam, concessimus et carta nostra confirmavimus, et eam optinuimus a domino papa Innocentio tertio confirmari; quam et nos observabimus et ab haeredibus nostris in perpetuum bona fide volumus observari.] Concessimus etiam omnibus liberis hominibus regni nostri, pro nobis et haeredibus nostris in perpetuum, omnes libertates subscriptas, habendas et tenendas, eis et haeredibus suis, de nobis et haeredibus nostris;

2. Si quis comitum vel baronum nostrorum, sive aliorum tenentium de nobis in capite per servitium militare, mortuus fuerit, et cum decesserit haeres suus plenae aetatis fuerit et relevium debeat, habeat haereditatem suam per antiquum relevium; scilicet haeres vel haeredes comitis de baronia comitis integra per centum libras; haeres vel haeredes baronis de baronia integra per centum libras; haeres vel haeredes militis de feodo militis integro per centum solidos ad plus; et qui minus debuerit minus det secundum antiquam consuetudinem feodorum.

3. Si autem haeres alicujus talium fuerit infra aetatem et fuerit in custodia, cum ad aetatem pervenerit, habeat haereditatem suam sine relevio et sine fine.

4. Custos terrae hujusmodi haeredis qui infra aetatem fuerit, non capiat de terra haeredis nisi rationabiles exitus, et rationabiles consuetudines, et rationabilia servitia, et hoc sine destructione et vasto hominum vel rerum; et si nos commiserimus custodiam alicujus talis terrae vicecomiti vel alicui alii qui de exitibus illius nobis respondere debeat, et ille destructionem de custodia fecerit vel vastum, nos ab illo capiemus emendam, et terra committatur duobus legalibus et discretis hominibus de feodo illo, qui de exitibus respondeant nobis vel ei cui eos assignaverimus; et si dederimus vel vendiderimus alicui custodiam alicujus talis terrae, et ille destructionem inde fecerit vel vastum, amittat ipsam custodiam, et tradatur duobus legalibus et discretis hominibus de feodo illo qui similiter nobis respondeant sicut praedictum est.

5. Custos autem, quamdiu custodiam terrae habuerit, sustentet domos, parcos, vivaria, stagna, molendina, et cetera ad terram illam pertinentia, de exitibus terrae, ejusdem; et reddat

haeredi, cum ad plenam aetatem pervenerit, terram suam totam instauratam de carrucis et wainnagiis secundum quod tempus wainnagii exiget et exitus terrae rationabiliter poterunt sustinere.

6. Haeredes maritentur absque disparagatione, [ita tamen quod, antequam contrahatur matrimonium, ostendatur propinquis de consanguinitate ipsius haeredis].

7. Vidua post mortem mariti sui statim et sine difficultate habeat maritagium et haereditatem suam, nec aliquid det pro dote sua, vel pro maritagio suo, vel haereditate sua quam haereditatem maritus suus et ipsa tenuerint die obitus ipsius mariti, et maneat in domo mariti sui per quadraginta dies post mortem ipsius infra quos assignetur ei dos sua.

8. Nulla vidua distringatur ad se maritandum dum voluerit vivere sine marito, ita tamen quod securitatem faciat quod se non maritabit sine assensu nostro, si de nobis tenuerit, vel sine assensu domini sui de quo tenuerit, si de alio tenuerit.

9. Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec pleggii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solutionem debiti; et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, pleggii respondeant de debito; et, si voluerint, habeant terras et redditus debitoris donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem pleggios.

[10. Si quis mutuo ceperit aliquid a Judaeis, plus vel minus, et moriatur ante-quam debitum illum solvatur, debitum non usuret quamdiu haeres fuerit infra aetatem, de quocumque teneat; et si debitum illud inciderit in manus nostras, nos non capiemus nisi catallum contentum in carta.]

[11. Et si quis moriatur, et debitum debeat Judaeis, uxor ejus habeat dotem suam, et nihil reddat de debito illo; et si liberi ipsius defuncti qui fuerint infra aetatem remanserint, provideantur eis necessaria secundum tenementum quod fuerit defuncti, et de residuo solvatur debitum, salvo servitio dominorum; simili modo fiat de debitis quae debentur aliis quam Judaeis.]

[12. Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem facien-

dum, et ad filiam nostram primogenitam semel maritandam, et ad haec non fiat nisi rationabile auxilium: simili modo fiat de auxiliis de civitate Londoniarum.]

13. Et civitas Londoniarum habeat omnes antiquas libertates et liberas consuetudines suas, [tam per terras, quam per aquas]. Praeterea volumus et concedimus quod omnes aliae civitates, et burghi, et villae, et portus, habeant omnes libertates et liberas consuetudines suas.

[14. Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus praedictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras; et praeterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite; ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonitionis causam summonitionis exprimemus; et sic facta summonitione negotium ad diem assignatum procedat secundum consilium illorum qui praesentes fuerint, quamvis non omnes summoniti venerint.]

[15. Nos non concedemus de cetero alicui quod capiat auxilium de liberis hominibus suis, nisi ad corpus suum redimendum, et ad faciendum primogenitum filium suum militem, et ad primogenitam filiam suam semel maritandam, et ad haec non fiat nisi rationabile auxilium.]

16. Nullus distringatur ad faciendum majus servitium de feodo militis, nec de alio libero tenemento, quam inde debetur.

17. Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo.

18. Recognitiones de nova dissaisina, de morte antecessoris, et de ultima praesentatione, non capiantur nisi in suis comitatibus et hoc modo; nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mittemus duos justiciarios per unumquemque comitatum per quatuor vices in anno, qui, cum quatuor militibus cujuslibet comitatus electis per comitatum, capiant in comitatu et in die et loco comitatus assisas praedictas.

19. Et si in die comitatus assisae praedictae capi non possint, tot milites et libere tenentes remaneant de illis qui interfuerint comitatui die illo, per quos possint judicia sufficienter fieri, secundum quod negotium fuerit majus vel minus.

20. Liber homo non amercietur pro parvo delicto, nisi secun-

dum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contemento suo; et mercator eodem modo salva mercandisa sua; et villanus eodem modo amercietur salvo wainnagio suo, si inciderint in misericordiam nostram; et nulla praedictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.

21. Comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti.

22. Nullus clericus amercietur [de laico tenemento suo], nisi secundum modum aliorum praedictorum, et non secundum quantitatem beneficii sui ecclesiastici.

23. Nec villa nec homo distringatur facere pontes ad riparias, nisi qui ab antiquo et de jure facere debent.

24. Nullus vicecomes, constabularius, coronatores, vel alii ballivi nostri, teneant placita coronae nostrae.

[25. Omnes comitatus, hundredi, wapentakii, et trethingii, sint ad antiquas firmas absque ullo incremento, exceptis dominicis maneriis nostris.]

26. Si aliquis tenes de nobis laicum feodum moriatur, et vicecomes vel ballivus noster ostendat litteras nostras patentes de summonitione nostra de debito quod defunctus nobis debuit, liceat vicecomiti vel ballivo nostro attachiare et inbreviare catalla defuncti inventa in laico feodo, ad valentiam illius debiti, per visum legalium hominum, ita tamen quod nihil inde amoveatur, donec persolvatur nobis debitum quod clarum fuerit; et residuum relinquatur executoribus ad faciendum testamentum defuncti; et, si nihil nobis debeatur ab ipso, omnia catalla cedant defuncto, salvo uxori ipsius et pueris rationabilibus partibus suis.

[27. Si aliquis liber homo intestatus decesserit, catalla sua per manus propinquorum parentum et amicorum suorum, per visum ecclesiae distribuantur, salvo unicuique debitis quae defunctus ei debebat.]

28. Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios, aut respectum inde habere possit de voluntate venditoris.

29. Nullus constabularius distringat aliquem militem ad dandum denarios pro custodia castri, si facere voluerit custodiam illam in propria persona sua, vel per alium probum hominem, si ipse eam facere non possit propter rationabilem causam; et si nos duxerimus vel miserimus eum in exercitum, erit quietus de

custodia, secundum quantitatem temporis quo per nos fuerit in exercitu.

30. Nullus vicecomes, vel ballivus noster, vel aliquis alius, capiat equos vel caretas alicujus liberi hominis pro cariagio faciendo, nisi de voluntate ipsius liberi hominis.

31. Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cujus boscus ille fuerit.

32. Nos non tenebimus terras illorum qui convicti fuerint de felonia, nisi per unum annum et unum diem, et tunc reddantur terrae dominis feodorum.

33. Omnes kydelli de cetero deponantur penitus de Thamisia, et de Medewaye, et per totam Angliam, nisi per costeram maris.

34. Breve quod vocatur *Praeceptum* de cetero non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam.

35. Una mensura vini sit per totum regnum nostrum, et una mensura cervisiae, et una mensura bladi, scilicet quarterium Londoniense, et una latitudo pannorum tinctorum et russetorum et halbergettorum, scilicet duae ulnae infra listas; de ponderibus autem sit ut de mensuris.

36. Nihil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedatur et non negetur.

37. Si aliquis teneat de nobis per feodifirmam, vel per sokagium, vel per burgagium, et de alio terram teneat per servitium militare, nos non habebimus custodiam haeredis nec terrae suae quae est de feodo alterius, occasione illius feodifirmae, vel sokagii, vel burgagii; nec habebimus custodiam illius feodifirmae, vel sokagii, vel burgagii, nisi ipsa feodifirma debeat servitium militare. Nos non habebimus custodiam haeredis vel terrae alicujus, quam tenet de alio per servitium militare, occasione alicujus parvae sergenteriae quam tenet de nobis per servitium reddendi nobis cultellos, vel sagittas, vel hujusmodi.

38. Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis.

39. Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.

40. Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.

41. Omnes mercatores habeant salvum et securum exire de

Anglia, et venire in Angliam, et morari et ire per Angliam, tam per terram quam per aquam, ad emendum et vendendum, sine omnibus malis toltis, per antiquas et rectas consuetudines, praeterquam in tempore gwerrae, et si sint de terra contra nos gwerrina; et si tales inveniantur in terra nostra in principio gwerrae, attachientur sine dampno corporum et rerum, donec sciatur a nobis vel capitali justiciario nostro quomodo mercatores terrae nostrae tractentur, qui tunc invenientur in terra contra nos gwerrina; et si nostri salvi sint ibi, alii salvi sint in terra nostra.

[42. Liceat unicuique de cetero exire de regno nostro, et redire, salvo et secure, per terram et per aquam, salva fide nostra, nisi tempore gwerrae per aliquod breve tempus, propter communem utilitatem regni, exceptis imprisonatis et utlagatis secundum legem regni, et gente de terra contra nos gwerrina, et mercatoribus de quibus fiat sicut praedictum est.]

43. Si quis tenuerit de aliqua escaeta, sicut de honore Walingeford, Notingeham, Bononiae, Lainkastriae, vel de aliis eskaetis, quae sunt in manu nostra, et sunt baroniae, et obierit, haeres ejus non det aliud relevium, nec faciat nobis aliud servitium quam faceret baroni si baronia illa esset in manu baronis; et nos eodem modo eam tenebimus quo baro eam tenuit.

44. Homines qui manent extra forestam non veniant de cetero coram justiciariis nostris de foresta per communes summonitiones, nisi sint in placito, vel pleggi alicujus vel aliquorum, qui attachiati sint pro foresta.

[45. Nos non faciemus justiciarios, constabularios, vicecomites, vel ballivos, nisi de talibus qui sciant legem regni et eam bene velint observare.]

46. Omnes barones qui fundaverunt abbatias, unde habent cartas regum Angliae, vel antiquam tenuram, habeant earum custodiam cum vacaverint, sicut habere debent.

47. Omnes forestae quae aforestatae sunt tempore nostro, statim deafforestentur; et ita fiat de ripariis quae per nos tempore nostro positae sunt in defenso.

[48. Omnes malae consuetudines de forestis et warennis, et de forestariis et warennariis, vicecomitibus et eorum ministris, ripariis et earum custodibus, statim inquirantur in quolibet comitatu per duodecim milites juratos de eodem comitatu, qui debent eligi per probos homines ejusdem comitatus, et infra quadraginta dies post inquisitionem factam, penitus, ita quod

numquam revocentur, deleantur per eosdem, ita quod nos hoc sciamus prius, vel iusticiarius noster, si in Anglia non fuerimus.]

[49. Omnes obsides et cartas statim reddemus quae liberatae fuerunt nobis ab Anglicis in securitatem pacis vel fidelis servitii.]

[50. Nos amovebimus penitus de balliis parentes Gerardi de Athyes, quod de cetero nullam habeant balliam in Anglia; Engelardum de Cygoniis, Andream, Petrum et Gyonem de Cancellis, Gyonem de Cygoniis, Galfridum de Martyni et fratres ejus, Philippum Mark et fratres ejus, et Galfridum nepotem ejus, et totam sequelam eorundem.]

[51. Et statim post pacis reformationem amovebimus de regno omnes alienigenas milites, balistarios, servientes, stipendiarios, qui venerint cum equis et armis ad nocumentum regni.]

[52. Si quis fuerit disseisitus vel elongatus per nos sine legali iudicio parium suorum, de terris, castallis, libertatibus, vel jure suo, statim ea ei restituemus; et si contentio super hoc orta fuerit, tunc inde fiat per iudicium viginti quinque baronum, de quibus fit mentio inferius in securitate pacis; de omnibus autem illis de quibus aliquis disseisitus fuerit vel elongatus sine legali iudicio parium suorum, per Henricum regem patrem nostrum vel per Ricardum regem fratrem nostrum, quae in manu nostra habemus, vel quae alii tenent, quae nos oporteat warrantizare, respectum habebimus usque ad communem terminum cruce signatorum; exceptis illis de quibus placitum motum fuit vel inquisitio facta per praeceptum nostrum, ante suceptionem crucis nostrae: cum autem redierimus de peregrinatione nostra, vel si forte remanserimus a peregrinatione nostra, statim inde plenam justiciam exhibebimus.]

[53. Eundem autem respectum habebimus, et eodem modo, de justicia exhibenda de forestis deafforestandis vel remansuris forestis, quas Henricus pater noster vel Ricardus frater noster afforestaverunt, et de custodiis terrarum quae sunt de alieno feodo, cujusmodi custodias hucusque habuimus occasione feodi quod aliquis de nobis tenuit per servitium militare, et de abbatibus quae fundatae fuerint in feodo alterius quam nostro, in quibus dominus feodi dixerit se jus habere; et cum redierimus, vel si remanserimus a peregrinatione nostra, super hiis conquestibus plenam justiciam statim exhibebimus.]

54. Nullus capiatur nec imprisonetur propter appellum foeminae de morte alterius quam viri sui.

[55. Omnes fines qui injuste et contra legem terrae facti sunt nobiscum, et omnia amerciamento facta injuste et contra legem terrae, omnino condonentur, vel fiat inde per iudicium viginti quinque baronum de quibus fit mentio inferius in securitate pacis, vel per iudicium majoris partis eorundem, una cum praedicto Stephano Cantuariensi archiepiscopo, si interesse poterit, et aliis quos secum ad hoc vocare voluerit: et si interesse non poterit, nihilominus procedat negotium sine eo, ita quod, si aliquis vel aliqui de praedictis viginti quinque baronibus fuerint in simili querela, amoveantur quantum ad hoc iudicium, et alii loco illorum per residuos de eisdem viginti quinque, tantum ad hoc faciendum electi et iurati substituantur.]

[56. Si nos dissaisivimus vel elongavimus Walenses de terris vel libertatibus vel rebus aliis, sine legali iudicio parium suorum, in Anglia vel in Wallia, eis statim reddantur; et si contentio super hoc orta fuerit, tunc inde fiat in marchia per iudicium parium suorum, de tenementis Angliae secundum legem Angliae, de tenementis Walliae secundum legem Walliae, de tenementis marchiae secundum legem marchiae. Idem facient Walenses nobis et nostris.]

[57. De omnibus autem illis de quibus aliquis Walensium dissaisitus fuerit vel elongatus sine legali iudicio parium suorum, per Henricum regem patrem nostrum vel Ricardum regem fratrem nostrum, quae nos in manu nostra habemus, vel quae alii tenent quae nos oporteat warantizare, respectum habebimus usque ad communem terminum crucesignatorum, illis exceptis de quibus placitum motum fuit vel inquisitio facta per praeceptum nostrum ante susceptionem crucis nostrae; cum autem redierimus, vel si forte remanserimus a peregrinatione nostra, statim eis inde plenam justiciam exhibebimus, secundum leges Walensium et partes praedictas.]

[58. Nos reddemus filium Lewelini statim, et omnes obsides de Wallia, et cartas quae nobis liberatae fuerunt in securitatem pacis.]

[59. Nos faciemus Allexandro regi Scottorum de sororibus suis, et obsidibus reddendis, et libertatibus suis, et jure suo, secundum formam in qua faciemus aliis baronibus nostris, Angliae, nisi aliter esse debeat per cartas quas habemus de Willelmo

patre ipsius, quondam rege Scottorum; et hoc erit per iudicium parium suorum in curia nostra.]

60. Omnes autem istas consuetudines praedictas et libertates quas nos concessimus in regno nostro tenendas quantum ad nos pertinet erga nostros, omnes de regno nostro, tam clerici quam laici, observent quantum ad se pertinet erga suos.

[61. Cum autem pro Deo, et ad emendationem regni nostri, et ad melius sopiendum discordiam inter nos et barones nostros ortam, haec omnia praedicta concesserimus, volentes ea integra et firma stabilitate gaudere in perpetuum, facimus et concedimus eis securitatem subscriptum; videlicet quod barones eligant viginti quinque barones de regno quos voluerint, qui debeant pro totis viribus suis observare, tenere, et facere observari, pacem et libertates quas eis concessimus, et hac praesenti carta nostra confirmavimus, ita scilicet quod, si nos, vel justiciarius noster, vel ballivi nostri, vel aliquis de ministris nostris, in aliquo erga aliquem deliquerimus, vel aliquem articulorum pacis aut securitatis transgressi fuerimus, et delictum ostensum fuerit quatuor baronibus de praedictis viginti quinque baronibus, illi quatuor barones accedant ad nos vel ad justiciarium nostrum, si fuerimus extra regnum, proponentes nobis excessum: petent ut excessum illum sine dilatione faciamus emendari. Et si nos excessum non emendaverimus, vel, si fuerimus extra regnum, justiciarius noster non emendaverit infra tempus quadraginta dierum computandum a tempore quo monstratum fuerit nobis vel justiciario nostro si extra regnum fuerimus, praedicti quatuor barones referant causam illam ad residuos de viginti quinque baronibus, et illi viginti quinque barones cum communa totius terra distringent et gravabunt nos modis omnibus quibus poterunt, scilicet per captionem castrorum, terrarum, possessionum, et aliis modis quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginae nostrae et liberorum nostrorum; et cum fuerit emendatum intendent nobis sicut prius fecerunt. Et quicumque voluerit de terra juret quod ad praedicta omnia exsequenda parebit mandatis praedictorum viginti quinque baronum, et quod gravabit nos pro posse suo cum ipsis, et nos publice et libere damus licentiam jurandi cuilibet qui jurare voluerit, et nulli umquam jurare prohibebimus. Omnes autem illos de terra qui per se et sponte sua noluerint jurare viginti quinque baronibus, de distringendo et gravando nos cum eis, faciemus jurare eosdem de mandato nostro, sicut

praedictum est. Et si aliquis de viginti quinque baronibus decesserit, vel a terra recesserit, vel aliquo alio modo impeditus fuerit, quo minus ista praedicta possent exsequi, qui residui fuerint de praedictis viginti quinque baronibus eligant alium loco ipsius, pro arbitrio suo, qui simili modo erit juratus quo et ceteri. In omnibus autem quae istis viginti quinque baronibus committuntur exsequenda, si forte ipsi viginti quinque praesentes fuerint, et inter se super re aliqua discordaverint, vel aliqui ex eis summoniti nolint vel nequeant interesse, ratum habeatur et firmum quod major pars eorum qui praesentes fuerint providerit, vel praeceperit, ac si omnes viginti quinque in hoc consensissent; et praedicti viginti quinque jurent quod omnia antedicta fideliter observabunt, et pro toto posse suo facient observari. Et nos nihil impetrabimus ab aliquo, per nos nec per alium, per quod aliqua istarum concessionum et libertatum revocetur vel minuatur; et, si aliquid tale impetratum fuerit, irritum sit et inane et numquam eo utemur per nos nec per alium.]

[62. Et omnes malas voluntates, indignationes, et rancores, ortos inter nos et homines nostros, clericos et laicos, a tempore discordiae, plene omnibus remisimus et condonavimus. Praeterea omnes transgressionem factas occasione ejusdem discordiae, a Pascha anno regni nostri sextodecimo usque ad pacem reformatam, plene remisimus omnibus, clericis et laicis, et quantum ad nos pertinet plene condonavimus. Et insuper fecimus eis fieri litteras testimoniales patentes domini Stephani Cantuariensis archiepiscopi, domini Henrici Dublinensis archiepiscopi, et episcoporum praedictorum, et magistri Pandulfi, super securitate ista et concessionibus praefatis.]

[63. Quare volumus et firmiter praecipimus quod Anglicana ecclesia libera sit et quod homines in regno nostro habeant et teneant omnes praefatas libertates, jura, et concessionem, bene et in pace, libere et quiete, plene et integre, sibi et haeredibus suis, de nobis et haeredibus nostris, in omnibus rebus et locis, in perpetuum, sicut praedictum est. Juratum est autem tam ex parte nostra quam ex parte baronum, quod haec omnia supradicta bona fide et sine malo ingenio observabuntur. Testibus supradictis et multis aliis. Data per manum nostram in prato quod vocatur Runingmede, inter Windelesorum et Stanes, quinto decimo die Junii, anno regni nostri septimo decimo.]

MATT. PARIS, p. 262. Hi autem sunt xxv. barones electi,

Comes de Clare.	Major de Lundonia.
Comes Albemariae.	Willelmus de Lanvalay.
Comes Gloverniae.	Robertus de Ros.
Comes Wintoniensis.	Constabularius Cestriae.
Comes Herefordensis.	Richardus de Perci.
Comes Rogerus (Bigot).	Johannes Filius Roberti.
Comes Robertus (de Vere).	Willelmus Malet.
Willelmus Marescallus, Junior.	Gaufridus de Say.
Robertus Filius Walteri, Senior.	Rogerus de Mumbezon.
Gilbertus de Clare.	Willelmus de Huntingfeld.
Eustachius de Vescl.	Ricardus de Muntfichet.
Hugo Bigod.	Willelmus de Albineio.
Willelmus de Munbrail.	

MAGNA CARTA.¹

THE GREAT CHARTER OF LIBERTIES OF KING JOHN,

GRANTED AT RUNINGMEDE, JUNE 15, A. D. 1215, IN THE SEVEN
TEENTH YEAR OF HIS REIGN.

[John, by the grace of God King of England, Lord of Ireland, Duke of Normandy, and Aquitaine, and Count of Anjou, to his Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Governors, Officers, and to all Bailiffs, and his lieges, greeting. Know ye, that we, in the presence of God, and for the salvation of our soul, and the souls of our ancestors and heirs, and unto the honour of God and the advancement of Holy Church, and amendment of our Realm, by advice of our venerable Fathers, Stephen, Archbishop of Canterbury, Primate of all England and Cardinal of the Holy Roman Church, Henry, Archbishop of Dublin, William of London, Peter of Winchester, Jocelin of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, Bishops; of Master Pandulph, Sub-Deacon and Familiar of our Lord the Pope, Brother Aymeric, Master of the Knights-Templars in

¹ The Text of Magna Carta here printed is that given by William Stubbs, Regius Professor of Modern History in Oxford University, in "Documents Illustrative of English History."

The translation printed is that given by E. S. Creasy, Barrister at Law, Professor of History in University College, London, in "The Rise and Progress of the English Constitution."

In a few places in the translation, indicated by notes, we have substituted words taken from the translation given by Richard Thomson in his Essay on Magna Carta, and (where indicated) from that of Thomas P. Taswell-Langmead, given in his "English Constitutional History."

The clauses and sentences omitted in Henry III.'s re-issues have been placed within brackets, as given in the text printed by Mr. Taswell-Langmead.

England; and of the Noble Persons, William Marescall, Earl of Pembroke, William, Earl of Salisbury, William, Earl of Warren, William, Earl of Arundel, Alan de Galloway, Constable of Scotland, Warin Fitz Gerald, Peter Fitz Herbert and Hubert de Burgh, Seneschal of Poitou, Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip of Albiney, Robert de Roppell, John Mareschal, John Fitz Hugh, and others our liegemen],² have, in the first place, granted to God, and by this our present charter confirmed, for us and our heirs for ever:

1. That the church of England shall be free, and have her whole rights, and her liberties inviolable; [and we will have them so observed, that it may appear thence, that the freedom of elections, which is reckoned chief and indispensable to the English church, and which we granted and confirmed by our charter, and obtained the confirmation of the same from our Lord the Pope Innocent III., before the discord between us and our barons, was granted of mere free will; which charter we shall observe, and we do will it to be faithfully observed by our heirs for ever]. 2. We also have granted to all the freemen of our kingdom, for us and for our heirs for ever, all the under-written liberties, to be had and holden by them and their heirs, of us and our heirs for ever: If³ any of our earls, or barons, or others, who hold of us in chief by military service, shall die, and at the time of his death his heir shall be of full age, and owes a relief, he shall have his inheritance by the ancient relief; that is to say, the heir or heirs of an earl, for a whole earldom, by a hundred pounds; the heir or heirs of a baron, for a whole barony, by a hundred pounds; the heir or heirs of a knight, for a whole knight's fee, by a hundred shillings at most; and whoever oweth less shall give less, according to the ancient custom of fees. 3. But if the heir of any such shall be under age, and shall be in ward when he comes of age, he shall have his inheritance without relief and without fine. 4. The keeper of the land of such an heir being under age, shall take of the land of the heir none but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste to his men and his goods; and if we commit the custody of any such lands to the sheriff, or any other who is answerable to us for the issues of the land, and he shall make destruction and waste of

² ¶ 1 of text.

³ ¶ 2 of text.

the lands which he hath in custody, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall answer for the issues to us, or to him to whom we shall assign them; and if we sell or give to any one the custody of any such lands, and he therein make destruction or waste, he shall lose the same custody, which shall be committed to two lawful and discreet men of that fee, who shall in like manner answer to us as aforesaid. 5. But the keeper, so long as he shall have the custody of the land, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the land, out of the issues of the same land; and shall deliver to the heir when he comes of full age, his whole land, stocked with ploughs and carriages, according as the time of wainage shall require, and the issues of the land can reasonably bear. 6. Heirs shall be married without disparagement, [and so that before matrimony shall be contracted those who are near in blood to the heir shall have notice]. 7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage and inheritance; nor shall she give anything for her dower, or her marriage, or her inheritance, which her husband and she held at the day of his death; and she may remain in the mansion house of her husband forty days after his death, within which term her dower shall be assigned. 8. No widow shall be distrained to marry herself, so long as she has a mind to live without a husband; but yet she shall give security that she will not marry without our assent, if she holds of us; or without the consent of the lord of whom she holds, if she hold of another. 9. Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to pay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor shall fail in the payment of the debt, not having wherewithal to pay it, then the sureties shall answer the debt; and if they will they shall have the lands and rents of the debtor, until they shall be satisfied for the debt which they paid for him, unless the principal debtor can show himself acquitted thereof against the said sureties. [10. If any one have borrowed anything of the Jews, more or less, and die before the debt be satisfied, there shall be no interest paid for that debt, so long as the heir is under age, of whomsoever he may hold; and if the debt fall into our hands

we will only take the chattel mentioned in the deed.] [11. And if any one shall die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if the deceased left children under age, they shall have necessities provided for them, according to the tenement of the deceased; and out of the residue the debt shall be paid, saving however, the service due to the lords; and in like manner shall it be done touching debts due to others than the Jews.] [12. No scutage or aid shall be imposed in our kingdom, unless by the general council of our kingdom; except for ransoming our person, making our eldest son a knight, and once for marrying our eldest daughter; and for these there shall be paid a reasonable aid. In like manner it shall be concerning the aids of the City of London.] 13. And the City of London shall have all its ancient liberties and free customs, [as well by land as by water]: furthermore we will and grant, that all other cities and boroughs, and towns and ports, shall have all their liberties and free customs. [14. And for holding the general council of the kingdom concerning the assessment of aids, except in the three cases aforesaid, and for the assessing of scutages, we will⁴ cause to be summoned the archbishops, bishops, abbots, earls, and greater barons of the realm, singly by our letters. And furthermore we shall cause to be summoned generally by our sheriffs and bailiffs, all others who hold of us in chief, for a certain day, that is to say, forty days before their meeting at least, and to a certain place; and in all letters of such summons we will declare the cause of such summons. And summons being thus made, the business of the day shall proceed on the day appointed, according to the advice of such as shall be present although all that were summoned come not.] [15. We will not for the future grant to any one that he may take aid of his own free tenants, unless to ransom his body, and to make his eldest son a knight, and once to marry his eldest daughter; and for this there shall be only paid a reasonable aid.] 16. No man shall be distrained to perform more service for a knight's fee, or other free tenement, than is due from thence. 17. Common pleas shall not follow our court, but shall be holden in some place certain. 18. Assizes of novel disseisin, and of mort d'ancestor, and of darrien presentment, shall not be taken but in their proper counties, and after this

⁴ For Creasy's "shall."

manner: We, or, if we should be out of the realm, our chief justiciary, shall send two justiciaries through every county four times a year, who, with four knights, chosen out of every shire by the people, shall hold the said assizes, in the county, on the day, and at the place appointed. 19. And if any matters cannot be determined on the day appointed for holding the assizes in each county, so many of the knights and freeholders as have been at the assizes aforesaid, shall stay to decide them, as is necessary, according as there is more or less business. 20. A freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it, saving to him his contenment; and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to his wainage, if he shall fall⁵ under our mercy; and none of the aforesaid amerciaments shall be assessed but by the oath of honest men in the neighborhood. 21. Earls and barons shall not be amerced, but by their peers, and after the degree of the offence. 22. No ecclesiastical person shall be amerced [for his lay tenement], but according to the proportion of the others aforesaid, and not according to the value of his ecclesiastical benefice. 23. Neither a town nor any tenant shall be distrained to make bridges or banks, unless that anciently and of right they are bound to do it. 24. No sheriff, constable, coroner, or other our bailiffs, shall hold pleas of our⁶ Crown. [25. All counties, hundreds, wapentakes, and tythings, shall stand at the old rents, without any increase, except in our demesne manors.] 26. If any one holding of us a lay-fee die, and the sheriff, or our bailiffs, show our letters patent, of summons for debt which the dead man did owe to us, it shall be lawful for the sheriff or our bailiff to attach and inroll the chattels of the dead, found upon his lay-fee, to the value of the debt, by the view of lawful men so as nothing be removed until our whole clear debt be paid; and the rest shall be left to the executors to fulfil the testament of the dead, and if there be nothing due from him to us, all the chattels shall go to the use of the dead, saving to his wife and children their reasonable shares. [27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest relations and friends, by view of the

⁵ For Creasy's "falls."

⁶ For Creasy's "the."

church; saving to every one his debts which the deceased owed to him.] 28. No constable or bailiff of ours shall take corn or other chattels of any man, unless he presently give him money for it, or hath respite of payment by the good-will of the seller. 29. No constable shall distrain any knight to give money for castle guard, if he himself will do it in his person, or by another able man in case he cannot do it through any reasonable cause. And if we lead him, or send him in an army, he shall be free from such guard for the time he shall be in the army by our command. 30. No sheriff or bailiff of ours, or any other, shall take horses or carts of any freeman for carriage, but by the good-will of the said freeman. 31. Neither shall we nor our bailiffs take any man's timber for our castles or other uses, unless by the consent of the owner of the timber. 32. We will retain the lands of those convicted of felony only one year and a day, and then they shall be delivered to the lord of the fee. 33. All weirs for the time to come shall be put down in the rivers of Thames and Medway, and throughout all England, except upon the sea-coast. 34. The writ which is called *Praecipe*, for the future, shall not be made out to any one, of any tenement, whereby a freeman may lose his court. 35. There shall be one measure of wine and one of ale through our whole realm; and one measure of corn, that is to say, the London quarter; and one breadth of dyed cloth, and russets, and habergeons, that is to say, two ells within the lists; and it shall be of weights as it is of measures. 36. Nothing from henceforth shall be given or taken for a writ of inquisition of life or limb, but it shall be granted freely, and not denied. 37. If any do hold of us by fee-farm, or by socage, or by burgage, and he hold also lands of any other by knight's service, we will not have the custody of the heir or land, which is holden of another man's fee by reason of that fee-farm, socage, or burgage; neither will we have the custody of such fee-farm, socage, or burgage, except knight's service was due to us out of the same fee-farm. We will not have the custody of an heir, nor of any land which he holds of another by knight's service, by reason of any petty serjeanty that holds of us, by the service of paying a knife, an arrow, or the like. 38. No bailiff from henceforth shall put any man to his law upon his own bare saying, without credible witnesses to prove it.

39. No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land. 40. To none will we sell, to none will we deny, or delay, right or justice.⁷

41. All merchants shall have safe and secure conduct, to go out of, and to come into England, and to stay there, and to pass as well by land as by water, for buying and selling by the ancient and allowed customs, without any evil tolls; except in time of war, or when they are of any nation at war with us. And if there be found any such in our land, in the beginning of the war, they shall be attached, without damage to their bodies or goods, until it be known unto us or our chief justiciary, how our merchants be treated in the nation at war with us; and if ours be safe there, the others shall be safe in our dominions. [42. It shall be lawful, for the time to come, for any one to go out of our kingdom, and return safely and securely, by land or by water, saving his allegiance to us; unless in time of war, by some short space, for the common benefit of the realm, except prisoners and outlaws, according to the law of the land, and people in war with us, and merchants who shall be in such condition as is above mentioned.] 43. If any man hold of any escheat, as of the honour of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which be in our hands, and are baronies, and die, his heir shall give no other relief, and perform no other service to us, than he would to the baron, if it were in the baron's hand; we will hold it after the same manner as the baron held it. 44. Those men who dwelt without the forest, from henceforth shall not come before our justiciaries of the forest, upon common summons, unless⁸ such as are impleaded, or are pledges for any that are attached for something concerning the forest. [45. We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it.] 46. All barons who have founded abbeys, and have the kings of England's charters of advowson, or the ancient tenure thereof, shall have the keeping of them, when vacant, as they ought to have. 47. All forests

⁷ The translation of § 40 is taken from Taswell-Langmead's *English Constitutional History*, p. 126.

⁸ For Creasy's "but."

that have been made forests in our time, shall forthwith be disforested; and the same shall be done with the water^o banks that have been fenced in by us in our time. [48. All evil customs concerning forests, warrens, foresters and warreners, sheriffs and their officers, rivers and their keepers, shall forthwith be inquired into in each county, by twelve sworn knights of the same shire, chosen by creditable persons of the same county; and within forty days after the said inquest, be utterly abolished, so as never to be restored: so as we are first acquainted therewith, or our justiciary, if we should not be in England. 49. We will immediately give up all hostages and writings delivered unto us by our English subjects, as securities for their keeping the peace, and yielding us faithful service. 50. We will entirely remove from our bailiwicks the relations of Gerard de Atheyes, so that for the future they shall have no bailiwick in England; we will also remove Engelard de Cygony, Andrew, Peter, and Gyon, from the Chancery; Gyon de Cygony, Geoffrey de Martyn and his brothers; Philip Mark, and his brothers, and his nephew, Geoffrey, and their whole retinue. 51. As soon as peace is restored, we will send out of the kingdom all foreign soldiers, cross-bowmen, and stipendiaries, who are come with horses and arms to the prejudice of our people. 52. If any one has been dispossessed or deprived by us, without the legal judgment of his peers, of his lands, castles, liberties, or right, we will forthwith restore them to him; and if any dispute arise upon this head, let the matter be decided by the five-and-twenty barons hereafter mentioned, for the preservation of the peace. As for all those things of which any person has, without the legal judgment of his peers, been dispossessed or deprived, either by King Henry our father, or our brother King Richard, and which we have in our hands, or are possessed by others, and we are bound to warrant and make good, we shall have a respite till the term usually allowed the crusaders; excepting those things about which there is a plea depending, or whereof an inquest hath been made, by our order, before we undertook the crusade, but when we return from our pilgrimage, or if perchance we tarry at home and do not make our pilgrimage, we will immediately cause full justice to be administered therein. 53. The same respite we shall have (and in the

^o For Creasy's "banks."

same manner about administering justice, disafforesting the forests, or letting them continue) for disafforesting the forests, which Henry our father, and our brother Richard have afforested; and for the keeping of the lands which are in another's fee, in the same manner as we have hitherto enjoyed those wardships, by reason of a fee held of us by knight's service; and for the abbeys founded in any other fee than our own, in which the lord of the fee says he has a right; and when we return from our pilgrimage, or if we tarry at home, and do not make our pilgrimage, we will immediately do full justice to all the complainants in this behalf.] 54. No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband. [55. All unjust and illegal fines made by us, and all amerciaments imposed unjustly and contrary to the law of the land, shall be entirely given up, or else be left to the decision of the five-and-twenty barons hereafter mentioned for the preservation of the peace, or of the major part of them, together with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and others whom he shall think fit to take along with him; and if he cannot be present, the business shall notwithstanding go on without him; but so that if one or more of the aforesaid five-and-twenty barons be plaintiffs in the same cause, they shall be set aside as to what concerns this particular affair, and others be chosen in their room, out of the said five-and-twenty, and sworn by the rest to decide the matter. 56. If we have disseised or dispossessed the Welsh, of any lands, liberties, or other things, without the legal judgment of their peers, either in England or in Wales, they shall be immediately restored to them; and if any dispute arise upon this head, the matter shall be determined in the marche by the judgment of their peers; for tenements in England according to the law of England, for tenements in Wales according to the law of Wales, for tenements of the marche according to the law of the marche; the same shall the Welsh do to us and our subjects. 57. As for all those things of which a Welshman hath, without the legal judgment of his peers, been disseised or deprived of by King Henry our father, or our brother King Richard, and which we either have in our hands or others are possessed of, and we are obliged to warrant it, we shall have a respite till the time generally allowed the crusaders; excepting those things about which a suit is depending, or whereof an inquest has been made by our

order, before we undertook the crusade: but when we return, or if we stay at home without performing our pilgrimage, we will immediately do them full justice, according to the laws of the Welsh and of the parts before mentioned. 58. We will without delay dismiss the son of Llewellyn, and all the Welsh hostages, and release them from the engagements they have entered into with us for the preservation of the peace. 59. We will treat with Alexander, King of Scots, concerning the restoring his sisters and hostages, and his right and liberties, in the same form and manner as we shall do to the rest of our barons of England; unless by the charters which we have from his father, William, late King of Scots, it ought to be otherwise; but this shall be left to the determination of his peers in our court.] 60. All the aforesaid customs and liberties, which we have granted to be holden in our kingdom, as much as it belongs to us, towards our people of our kingdom, as well clergy as laity shall observe, as far as they are concerned, towards their tenants.¹⁰ [61. And whereas, for the honour of God and the amendment of our kingdom, and for the better quieting the discord that has arisen between us and our barons, we have granted all these things aforesaid; willing to render them firm and lasting, we do give and grant our subjects the underwritten security, namely, that the barons may choose five-and-twenty barons of the kingdom, whom they think convenient; who shall take care, with all their might, to hold and observe, and cause to be observed, the peace and liberties we have granted them, and by this our present charter confirmed; so that if we, our justiciary, our bailiffs, or any of our officers, shall in any circumstance fail in the performance of them, towards any person, or shall break through any of these articles of peace and security, and the offence be notified to four barons chosen out of the five-and-twenty before mentioned, the said four barons shall repair to us, or our justiciary, if we are out of the realm, and, laying open the grievance, shall petition to have it redressed without delay: and if it be not redressed by us, or if we should chance to be out of the realm, if it should not be redressed by our justiciary, within forty days, reckoning from the time it has been notified to us, or to our justiciary, (if we should be out of the realm,) the four barons aforesaid shall lay the cause before the rest of

¹⁰ For Creary's "dependents."

the five-and-twenty barons; and the said five-and-twenty barons, together with the community of the whole kingdom, shall distrain and distress us in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed according to their pleasure; saving harmless our own person, and the persons of our queen and children; and when it is redressed, they shall obey us as before. And any person whatsoever in the kingdom, may swear that he will obey the orders of the five-and-twenty barons aforesaid, in the execution of the premises, and will distress us, jointly with them, to the utmost of his power; and we give public and free liberty to any one that shall please to swear to this, and never will hinder any person from taking the same oath. 62. As for all those of our subjects who will not, of their own accord, swear to join the five-and-twenty barons in distraining and distressing us, we will issue orders to make them take the same oath as aforesaid. And if any one of the five-and-twenty barons dies, or goes out of the kingdom, or is hindered any other way from carrying the things aforesaid into execution, the rest of the said five-and-twenty barons may choose another in his room, at their discretion, who shall be sworn in like manner as the rest. In all things that are committed to the execution of these five-and-twenty barons, if, when they are all assembled together, they should happen to disagree about any matter, and some of them, when summoned, will not, or cannot come, whatever is agreed upon, or enjoined, by the major part of those that are present, shall be reputed as firm and valid as if all the five-and-twenty had given their consent; and the aforesaid five-and-twenty shall swear, that all the premises they shall faithfully observe, and cause with all their power to be observed. And we will not, by ourselves, or by any other, procure anything whereby any of these concessions and liberties may be revoked or lessened; and if any such thing be obtained, let it be null and void; neither shall we ever make use of it, either by ourselves or any other. And all the ill will, indignations, and rancours that have arisen between us and our subjects, of the clergy and laity, from the first breaking out of the dissensions between us, we do fully remit and forgive: moreover all trespasses occasioned by the said dissensions, from Easter in the fifteenth year of our reign, till the restoration of peace and tranquillity, we hereby entirely remit to all, both clergy and laity, and as far as

in us lies do fully forgive. We have, moreover, caused to be made for them the letters patent testimonial of Stephen, lord archbishop of Canterbury, Henry, lord archbishop of Dublin, and the bishops aforesaid, as also of master Pandulph, for the security and concessions aforesaid. 63. Wherefore we will and firmly enjoin, that the Church of England be free, and that all the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, truly and peaceably, freely and quietly, fully and wholly to themselves and their heirs, of us and our heirs, in all things and places, for ever, as is aforesaid. It is also sworn, as well on our part as on the part of the barons, that all the things aforesaid shall be observed *bona fide* and without evil subtilty. Given under our hand, in the presence of the witnesses above named, and many others, in the meadow called Runingmede, between Windsor and Staines, the 15th day of June, in the 17th year of our reign.]

FEDERAL PROCEDURE AT LAW.

CHAPTER I.

THE CONSTITUTIONAL BASIS OF PROCEDURE IN THE COURTS OF THE UNITED STATES.

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| <p>§ 1. Three branches of the law.</p> <p>2. No definite line between procedure and substantive law.</p> <p>3. Same—Illustration—Remedy on contract.</p> <p>4. Same—Illustration — Procedure for protection of life and personal liberty.</p> <p>5. Importance of the law of procedure.</p> <p>6. Same—Judicial murders in England.</p> <p>7. Same—Same—Statement of Hallam.</p> <p>8. Struggle in England for just procedure.</p> | <p>§ 9. Same—In American colonies.</p> <p>10. Federal procedure established by constitutional provision.</p> <p>11. Same.</p> <p>12. The study of federal procedure should begin with the constitution.</p> <p>13. Same—Intimate relation between criminal and civil procedure.</p> <p>14. Same—Further necessity for the examination of the constitution in the study of federal procedure.</p> <p>15. Same—A general view of the government requisite.</p> |
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§ 1. Three branches of the law.—In the practical administration of justice, it is the habit of the legal and judicial mind to consider the law as divided into three great branches, namely: (1) Those constitutional and statutory provisions by which the courts of judicature are created and established and their jurisdiction is defined and limited; (2) the rules of substantive law and jurisprudence which define the rights, duties and liabilities of persons; and (3) the rules of procedure by which the jurisdiction of the courts is invoked, the appropriate relief is obtained, and the judgment or decree of the court is finally and fully executed. This is especially true in the federal judicial system, where the jurisdiction of the courts

is special and limited, and the rules of substantive law to be applied are drawn from both the state and federal laws, and also from general jurisprudence, and their procedure is hedged about by constitutional limitations and controlled in some instances by federal laws, and in others by state regulations.

§ 2. No definite line between procedure and substantive law.—Neither the courts of judicature nor the legislative power has ever been able to, nor have they attempted to draw any definite line between the rules of procedure and the rules of substantive law. Indeed, such a line of demarkation is impossible, for the reason that, in many instances, the right to a particular remedy or procedure is a valuable substantive right, given by the law for the protection of the rights of person or property.¹

§ 3. Same—Illustration—Remedy on contract.—A remedy for the enforcement of a contract is a procedure, but at the same time it is a valuable right, of which persons may not be constitutionally deprived; for if a law should be passed, materially diminishing the effectiveness of the remedy, such law would be, as to past transactions, void, as being a law impairing the obligation of contracts.²

§ 4. Same—Illustration—Procedure for protection of life and personal liberty.—The right of a person charged with an infamous crime to be prosecuted only on a presentment or indictment of a grand jury, to be informed of the nature and cause of the accusation against him, tried by an impartial jury, confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, is the right to certain procedure. and it is also a substantive right, fundamental in its character, and secured by constitutional guaranty.³

§ 5. Importance of the law of procedure.—In the administration of public justice, in both criminal and civil causes, the importance of a just, simple, reasonable and humane procedure

¹ *Kring v. Missouri*, 107 U. S. 289.

² *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Tenn. v. Sneed*, 96 U. S. 69; *Barnitz v. Beverly*, 163 U. S. 125; *Edwards v. Kearzey*, 96 U. S. 595;

Antoni v. Greenhow, 107 U. S. 769; *Spratt v. Reid*, 3 Green (Ia.) 489; *Robinson v. Howe*, 13 Wis. 341; *Cargill v. Power*, 1 Mich. 369.

³ U. S. Const. V and VI arts. of Amend.

cannot be overestimated; the maintenance of such a procedure, intelligently and faithfully enforced by the courts of judicature, constitutes the highest evidence of an advanced civilization, while its absence indicates national decay, and entails upon civil society universal inconvenience, ills, and misery.⁴

§ 6. **Same—Judicial murders in England.**—From the accession of Henry VII to the revolution in 1688, the national life of England was one continued carnival of judicial murders, in which the very flower of the kingdom were destroyed, their heritable blood corrupted, and their estates forfeited to the crown; and that career of national crime was accomplished by denying to its victims that reasonable and just judicial procedure which is the common right of mankind.⁵

§ 7. **Same—Same—Statement of Hallam.**—Mr. Hallam, in his Constitutional History, speaking of this period, said: "Civil liberty in this kingdom has two direct guaranties: the open administration of justice according to known laws truly interpreted, and fair construction of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain the redress of public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom where this condition is not found both in its judicial institutions and in their constant exercise. In this, much more than in positive law, our ancient constitution, both under the Plantagenet and Tudor lines, had ever been failing; and it is because one set of writers have looked merely to the letter of our statutes or other authorities, while another have been almost exclusively struck by the instances of arbitrary government they found on record, that such incompatible systems have been laid down with equal positiveness on the character of that constitution.

"I have found it impossible not to anticipate, in more places than one, some of those glaring transgressions of natural as well as positive law, that render our courts of justice in cases of treason little better than the caverns of murderers. Whoever

⁴ Hallam's Const. Hist. Eng. 138, 471. X, 105; ib. XI, 297, 322, 834, 861, 862. Hallam's Const. Hist. Eng-

⁵ State Tr. I, 965, 985, 1148, 1256, 1403; ib. IV, 857, 1329; ib. VI, 153, 687; ib. IX, 577, 818, 834, 899; ib. 418, 419, 471, 472, 488, 489, 490.

was arraigned at their bar was almost certain to meet a virulent prosecutor, a judge hardly distinguishable from the prosecutor except by his ermine, and a passive, pusillanimous jury. Those who are acquainted only with our modern decent and dignified procedure, can form little conception of the irregularity of ancient trials; the perpetual interrogation of the prisoner, which gives most of us so much offense at this day in the tribunals of a neighboring kingdom; and the want of all evidence except written, perhaps unattested, examinations or confessions."⁶ And again: "There was, indeed, good reason to distrust the course of justice. Never were our tribunals so disgraced by the brutal manners and iniquitous partiality of the bench as in the latter years of this (Cha. II) reign. The State Trials, none of which appear to have been published by the prisoners' friends, bear abundant testimony to the turpitude of the judges. They explained away and softened the palpable contradictions of the witnesses for the crown, insulted and threatened those of the accused, checked all cross-examination, assumed the truth of the charge throughout the whole of every trial."⁷

§ 8. **Struggle in England for just procedure.**—From Magna Charta to the Revolution of 1688, and, indeed, long subsequent thereto, the English people were engaged in an unremitting struggle for the establishment of a just and humane judicial procedure and the independence of their judges. "The whole fabric of English liberty rose step by step, through much toil and many sacrifices, each generation adding some new security to the work, and trusting that posterity would perfect the labor as well as enjoy the reward."⁸ But not until very recent times were the iniquities of the judicial procedure of that country fully and finally swept away.⁹

§ 9. **Same—In American Colonies.**—This struggle for a just and humane judicial procedure was not confined to the realm of England, but was vigorously prosecuted by the American

⁶ Hallam's Const. Hist. England, 138.

⁷ Hallam's Const. Hist. England, 471.

⁸ Hallam's Middle Ages, chap. VIII, and especially p. 546; and see, generally, Hallam's Const.

Hist. England; May's Const. Hist. Eng. chap. XI.

⁹ Bl. Com. Bk. IV, chap. XXVII; Stat. 7 William III, C. 3; Stat. 6 & 7 William IV, C. 114; Stat. 20 George II, C. 30.

colonies, who claimed that they were entitled to the rights, liberties and immunities of free and natural-born subjects within the realm of England, to the principles of the English constitution and the several charters, to the common law of England and especially to trial by a jury of the vicinage, to the benefit of such English statutes as existed at the time of their colonization and which they had found by experience applicable to their local and other circumstances, and likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters or secured by their several codes of provincial laws.¹⁰

At the beginning of the period of colonial legislation in this country (which is usually reckoned to be the fourth year of James I, A. D. 1607), the following had been established as principles of the English constitution, viz.: (1) "No man could be committed to prison but by a legal warrant specifying the offense; and, by a usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of jail-delivery. (2) The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offense was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made. Civil rights, so far as they depended on questions of fact, were subject to the same decision. (3) The officers and servants of the crown, violating the personal liberty or other right of the subject, might be sued in an action for damages, to be assessed by a jury, or, in some cases, were liable to criminal process; nor could they plead any warrant or command in their justification, not even the direct order of the king."¹¹ But, as will be shown in a subsequent chapter, these principles were constantly violated in England and in the colonies until about the time of the American Revolution; and these abuses were, in part, the justification of that Revolution.¹²

§ 10. Federal procedure established by constitutional provision.—The founders of this government, learning wisdom from the history of the English people and the American col-

¹⁰ Declaration of Rights (1774)
1 Pitk. Hist. 344; Declaration of Independence.

¹¹ Hallam's Const. Hist. Eng. 14.
¹² Declaration of Independence.

onies, to make secure the fruits of the Revolution, established the great outlines of the judicial procedure to be pursued in the courts of the United States by constitutional provisions; this end was secured in part by some provisions contained in the constitution as originally adopted, but more fully by the amendments soon thereafter adopted;¹³ and additional limitations were by the later amendments imposed upon the state governments.¹⁴ These constitutional provisions do not prescribe the details of procedure, but they do, by limitations at least, establish the great principles of that beneficent system of procedure which is the common right of mankind, and which should be the heritage of all civil society.

§ 11. Same.—The constitution extends the judicial power of the United States to three classes of cases, namely: (1) Cases in law, (2) cases in equity, and (3) cases of admiralty and maritime jurisdiction;¹⁵ and in “suits at common law” (which is the same thing as “cases in law”) the right of trial by jury is preserved.¹⁶ This classification which is found in the constitution itself, and which is written in the language of the common law, and which was taken from the English judicial system, was, in itself, the adoption of the English common law, chancery, and admiralty systems of judicial procedure, with their known differences and distinctions.¹⁷

§ 12. The study of federal procedure should begin with the constitution.—Inasmuch as the foundation of judicial procedure in the courts of the United States is laid in the constitution and its amendments, all intelligent and philosophical study of the subject must begin by an examination of the provisions of that instrument which lie at the base of the fabric, and the examination should be extended to those provisions which have a collateral bearing on the matters under investigation.

§ 13. Same—Intimate relation between criminal and civil procedure.—On account of the broad application of those provisions of the constitution which protect persons against unreasonable searches and seizures and self-accusation, it is

¹³ U. S. Const. art. I, sec. 9, clause 3 and sec. 10 (last clause), art. III, sec. 2, clauses 1, 3, sec. I, and Amend. IV–VIII inclusive.

¹⁴ U. S. Const. Amend. XIV, sec. 1.

¹⁵ U. S. Const. art. III, sec. 2.

¹⁶ U. S. Const. Amend. VII.

¹⁷ *Parsons v. Bedford*, 3 Pet. 433.

impossible to enter into an examination of civil procedure without entering also into an examination of criminal procedure. As illustrating this point, it will be shown in subsequent sections that the provisions of the constitution just referred to protect not only persons charged with crimes, but also witnesses and parties in civil suits from disclosures which may subject them to a criminal accusation or prosecution or to any penalty or punishment or forfeiture or which may convict them of any crime, or which may tend to such a result, or which may lead to other evidence that could be used for that purpose.¹⁸

§ 14. Same—Further necessity for the examination of the constitution in the study of federal procedure.—In addition to the reasons above given for an examination of the provisions of the federal constitution affecting the administration of justice in the federal courts, as a basis for the procedure in those courts, the following appear to be of great weight, namely: (1) The jurisdiction of those courts is special and limited and derived alone from the constitution and laws of the United States,¹⁹ and a large class of the cases over which they have jurisdiction arises under the provisions of the constitution,²⁰ and the jurisdiction of the cause often arises under some provision bearing directly upon procedure,²¹ so that questions of procedure are intimately connected with questions of jurisdiction throughout the whole system of federal jurisprudence. (2) By statute the federal courts have adopted state procedure in cases in law, “as near as may be,”²² and it may and does frequently happen that some provision of state procedure is in conflict with some provision of the constitution upon the subject of procedure or which constitutes one of the guaranties of life, liberty or property.²³ It must be apparent that the subject of procedure in the federal courts is intimately connected and interlaced with many of the provisions of the constitution, and that a complete understanding of the one cannot be attained without careful examination of the other.

¹⁸ *Boyd v. United States*, 116 U. S. 616-641.

¹⁹ *Fishback v. Western Union Telephone Co.*, 161 U. S. 96.

²⁰ U. S. Const. art. III, sec. 2.

²¹ *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307.

²² U. S. R. S. sec. 914.

²³ *Ex parte Fisk*, 113 U. S. 713; *Scott v. Neely*, 140 U. S. 106, 117 (35:358); *Pennoyer v. Neff*, 95 U. S. 714, 748 (24:565).

§ 15. Same—A general view of the government requisite.— The judicial department is a co-ordinate branch of the government, and through it is exercised that judicial sovereignty which is inherent in every state or nation. Judicial power is sovereign power. Judicial power is one of the foundation-stones of all civil society and all political institutions. In all modern governments, the judiciary is created and established by, and its powers and its relations to the other branches of the government are defined in the organic law; it is an integral part of the fabric of government, operating directly upon all persons and property within the territorial jurisdiction of the sovereignty of which it is a part;²⁴ and it, therefore, follows that no just and correct conception of the powers, jurisdiction and modes of procedure of the courts of judicature can be reached except by and through a consideration and view of all the powers of government and their relations to each other, and this is especially true in this country under our dual system of governments, federal and state, with their courts exercising jurisdiction in the same territory.²⁵

²⁴ *Georgia v. Stanton*, 6 Wall. 50; *Federalist*, Nos. 46, 47, 48, 49, 50; *Federal Const. and Consts. of the several states*.
²⁵ *Ableman v. Booth*, 21 How. 516; *United States v. Tarble*, 13 Wall. 397.

CHAPTER II.

THE DUAL SYSTEM OF GOVERNMENT IN THE UNITED STATES.

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§ 16. By revolution the thirteen colonies became sovereign states.—By revolution, made good and effectual by the success of the war for independence, each one of the thirteen colonies became a free, independent and sovereign state, charged with all the duties and vested with all the powers, rights and incidents of sovereignty, and so continued until by the adoption of the federal constitution a large and important portion of that sovereignty was devolved upon and vested in the government of the United States. By the treaty of peace Great Britain acknowledged and recognized the sovereignty and independence of the colonies, each, respectively, but she did not grant those rights. They had already been achieved by successful revolution.¹

¹ *McIlvaine v. Coxe's Lessee*, 4 Cranch, 209; *Martin v. Waddell*, 16 Pet. 406-418; *Pollard v. Hagan*, 3 How. 219-230; *License Cases*, 5

§ 17. **Two governments in each state—Relations between them—Each supreme in its sphere.**—There are, as a result of the adoption of the constitution, within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers, with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The constitution and the laws passed in pursuance thereof, and all treaties made or which shall be made under the authority of the United States are declared by the constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, “anything in the constitution or laws of any state to the contrary notwithstanding.” Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy, until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. The judicial power conferred by the constitution upon the courts of the United States extends to all cases arising under the constitution, and, therefore, embraces every legislative act of congress, whether passed in pursuance of it or in disregard of its provisions; the constitu-

How. 586-590; *Gibbons v. Ogden*, 9 Wheat. 187; *Mumford v. Wardell*, 6 Wall. 423-439; *Knight v. United States Land Ass'n*, 142 U. S. 161-216; *Johnson v. McIntosh*, 8 Wheat. 584 (5:691); *Rhode Island v. Massachusetts*, 12 Pet. 720 (9:1259); *In re Narragansett Indians* (Supreme Court Rhode Island, Feb. 24, 1898), 40 Atl. 347-373.

tion is brought under the view of the tribunals of the United States when any act of congress is brought before them for consideration. Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority. In their laws and modes of enforcement, neither is responsible to the other. How their respective laws shall be enacted, how they shall be carried into execution, and in what tribunals, or by what officers, and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.²

§ 18. Sovereignty of the state restricted by the federal constitution.—The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed, should be ceded to the general government; and that, in the sphere of action assigned to it by the constitution, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established. And although each state is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the general government, and the state governments, although both exist and exercise their powers within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And

² United States v. Tarble, 13 316-437 (4:579); Ableman v. Wall. 397, 413 (20:597, 600); McBooth, 21 How. 506, 526 (16:169). Culloch v. Maryland, 4 Wheat.

the sphere of action appropriated to the United States by the constitution is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye.³

§ 19. Two judicial systems in each state.—There are, as a necessary result of our dual government, within the territorial limits of each state, two systems of judicial courts, the federal and the state, administering justice within the same territorial limits at the same time; sometimes exercising co-ordinate and concurrent jurisdiction, at other times exclusive jurisdiction; sometimes administering and applying the same system of laws, at other times separate and distinct systems of laws; but in all instances, except in the class of cases in which the United States supreme court is by the federal constitution given appellate jurisdiction over the state courts, the two systems of courts act separately and independently of each other; and in their respective spheres of action, when jurisdiction has attached, the processes, judgments and decrees of the one are beyond the reach of, and cannot be interfered with by the other.⁴

§ 20. The federal government does not possess all the attributes of sovereignty.—Although the government of the United States is sovereign and supreme in its appropriate sphere of action, as defined by the federal constitution, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the constitution.⁵ The government of the United States is acknowledged by all to be one of enumerated powers; the principle, that it can exercise only the powers granted to it in the constitution, has been universally admitted from the time of its organization.⁶

³ *Ableman v. Booth*, 21 How. 506, 526 (16:169, 177).

⁴ *Amy v. Barkholder*, 11 Wall. 136 (20:101); *Riggs v. Johnson County*, 6 Wall. 166 (18:768); *Ableman v. Booth*, 21 How. 516 (16:173).

⁵ *Dred Scott v. Sandford*, 19

How. 393, 633 (15:691); *Re Debs*, 158 U. S. 564, 600 (39:1092); *Ableman v. Booth*, 21 How. 506 (16:169); *U. S. v. Tarble*, 13 Wall. 397 (20:597).

⁶ *McCulloch v. Maryland*, 4 Wheat. 316 (4:579).

§ 21. **The government of the United States is national in its character.**—The government of the United States is a national government, and is the only government in this country that has the character of nationality. It is vested with power over all the foreign relations of the country; it has been given jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws. Its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.⁷

§ 22. **General statement of the powers of the United States government.**—It appears from a simple reading of the words of the federal constitution, that the government of the United States is vested with a large and important part of those powers and attributes which nations have always regarded as sovereign, and that it is essentially a national government. It is vested with the power to make treaties, appoint and receive ambassadors, public ministers and consuls, and is charged with the diplomatic, foreign and international relations between this country and the nations of the world. It has the power to levy taxes for national purposes, declare war and conclude peace; to raise and support armies, and provide and maintain a navy, and to suppress insurrections and repel invasions. It has the power to define and punish the crimes of treason, piracies and felonies committed on the high seas, and offenses against the laws of nations. It has the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes; to establish post-offices and post-roads; to maintain the currency and fix the standard of weights and measures. It has power to control the territories, admit new states into the union, guaranty to every state in the union a

⁷ *Gibbons v. Ogden*, 9 Wheat. 130 U. S. 581-611 (32:1068); *McCulloch v. Maryland*, 4 Wheat. 316-437 (4:579-609); *Knox v. Lee*, 12 Wall. 457-680 (20:287).
 1-240 (6:23-80); *Cohens v. Virginia*, 6 Wheat. 264 (5:257);
Chae Chan Ping v. United States,

republican form of government, and to protect each of them against invasion, and, in certain contingencies, against domestic violence; and to execute its laws upon every foot of soil in this country, either by judicial process or force of arms. And the constitution of the United States and the laws and treaties made in pursuance thereof are the supreme law of the land.⁸

§ 23. **Implied powers of the federal government.**—In construing the constitution of the United States, what is implied is as much a part of the instrument as what is expressed.⁹ There is no phrase in the constitution which, like the articles of confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all means by which they may be carried into execution, would partake of the prolixity of a code of laws, and could scarcely be embraced by the human mind. The very nature of a written constitution requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the constitution is not only to be inferred from the nature of the instrument, but from its language. It must have been the intention of those who framed the constitution, to insure, as far as human prudence could insure, the beneficial execution of those great powers conferred by the instrument upon the general government for the welfare of the nation; this could not have been done by confining the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which would be conducive to the end. Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the

⁸ *McCulloch v. Maryland*, 4 Wheat. 316 (4:579); *Knox v. Lee*, 12 Wall. 457-680 (20:287); *Chae Chan Ping v. United States*, 130 U. S. 581-611 (32:1068); *Re Debs*, 158 U. S. 564-600 (39:1092); *Ex parte Sibold*, 100 U. S. 371, 395 (25:715); *U. S. v. Tarble*, 13 Wall. 397 (20:597); *Ableman v. Booth*, 21 How. 506 (16:169).
⁹ *Ex parte Yarbrough*, 110 U. S. 651 (28:274).

letter and spirit of the constitution, are constitutional.¹⁰ Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.¹¹

§ 24. **Same—Meaning of implication.**—That some degree of implication must be given to words, is a proposition of universal application. Implication is but another term for *meaning and intention* apparent in the writing on judicial inspection; it is the evident consequence, or some necessary consequence, resulting from the law, or from the words of an instrument, in the construction of which the words, the subject, the context, and the intention of the persons using them, are all to be taken into view.¹² It is the duty of the courts to interpret the constitution according to its true intent and meaning when it was adopted,¹³ and in such manner, as, consistently with its words, shall fully and completely effectuate its objects.¹⁴

§ 25. **Same—Power of congress not left to “general reasoning.”**—The constitution has not left the power of congress to employ the necessary means for the execution of the power conferred on the government to general reasoning. To its enumeration of powers is added that of making “all laws which shall be necessary and proper, for carrying into execution the foregoing powers and all other powers vested by this constitution, in the government of the United States or in any department thereof;” and the necessity spoken of is not to be understood as absolute, but the constitution has vested in congress that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the duties assigned to it in the manner most beneficial to the people.¹⁵

§ 26. **An implied power deduced from a group of specified powers.**—It is not, it is said, indispensable to the existence of any power claimed for the federal government that it can be

¹⁰ *McCulloch v. Maryland*, 4 Wheat. 316 (4:579).

¹¹ *United States v. Fisher*, 2 Cranch, 358, 405 (2:304, 320).

¹² *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233).

¹³ *Dred Scott v. Sandford*, 19 How. 393. (15:691); *South Carolina v. United States*, 199 U. S. 437.

¹⁴ *Prigg v. Pennsylvania*, 16 Pet. 539 (10:1060).

¹⁵ *McCulloch v. Maryland*, 4 Wheat. 316–437 (4:579); *Knox v. Lee*, 12 Wall. 457–680 (20:27); *Luxton v. North River Bridge Co.*, 153 U. S. 525–534 (38:808).

found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers specified. It is allowable to group together any number of the specified substantive powers and infer from them all, that the power claimed has been conferred. A power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive.¹⁶

§ 27. The powers of government classified according to their distribution by the constitution.—Under the dual system of government which has been established by the federal constitution, as expounded in the decisions of the supreme court of the United States, the powers of government with reference to their distribution between the national and state governments are divided into four classes, namely: (1) Those powers which belong exclusively to the states; (2) those powers which belong exclusively to the national government; (3) those powers which may be exercised concurrently and independently by both; and (4) those powers which may be exercised by the states, but only until congress shall see fit to act upon them, when the authority of the state retires and lies in abeyance as to such powers until the occasion for their exercise shall recur.¹⁷

§ 28. Same—What powers may be exercised by the states.—The states may exercise concurrent and independent powers in all cases but three, namely: (1) Where the power is by the constitution vested exclusively in the national government; (2) Where the power is by the constitution vested in the national government and prohibited to the states; and (3) where from the nature and subject of the power, it must necessarily be exercised by the national government exclusively.¹⁸

¹⁶ *Knox v. Lee*, 12 Wall. 457-680 (20:287); *United States v. Marigold*, 9 How. 560-570 (13:257).

¹⁷ *Ex parte McNeill*, 13 Wall. 236, 243 (20:624); *Railroad Co. v. Fuller*, 17 Wall. 560, 570 (21:710); *Bank v. Dearing*, 91 U. S. 29, 37 (23:196); *Gilman v. Philadelphia*,

3 Wall. 713, 744 (18:96); *Cooley v. Port Wardens*, 12 How. 299 (13:996); *Wilson v. Black Bird Creek Marsh Co.*, 1 Pet. 245 (7:413); *Olsen v. Smith*, 195 U. S. 332, 345 (49:224).

¹⁸ *Gilman v. Philadelphia*, 3 Wall. 713, 744 (18:96); *Mobile County v. Kimball*, 102 U. S. 691,

§ 29. **The commercial power—Reasons for vesting it in the national government.**—The universally recognized necessity for the rescue of American commerce from the embarrassments and degradation resulting from the diverse and conflicting regulations of commerce adopted by the states, and the hostile regulations of commerce by foreign nations, which could not be successfully resisted by the disunited efforts of the states, and the further and commanding necessity for the establishment and maintenance of a wise, just, equitable and enlightened code of commercial regulations, operating uniformly throughout the union in all matters national in their character, whose execution and administration should be committed to one national government, vested with the power and possessed of the means with which to enforce such regulations, were among the most influential considerations which induced the assembling of the constitutional convention and led to the formation and adoption of the constitution; and congress was given the power to regulate commerce for the purpose of curing the very mischief which had been so influential, as a moving cause, in inducing the states to abandon the articles of confederation and “form a more perfect union” by the adoption of the constitution; and the grant of the power is as extensive as the mischief it was intended to eradicate. and the federal judiciary has constantly and persistently refused to impair the efficacy of the power by restricted construction.¹⁹ The object and design of the power to regulate commerce was to establish among the several states a perfect equality as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain.²⁰

707 (26:238); *Crandall v. Nevada*, 6 Wall. 35 (18:745); *Welton v. Missouri*, 91 U. S. 275 (23:347); *Henderson v. Mayor of New York*, 92 U. S. 259 (23:543); *Cooley v. Port Wardens*, 12 How. 297 (13:996); *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 345 (37:470); *Olson v. Smith*, 195 U. S. 332, 345 (49:224).

¹⁹ *Brown v. Maryland*, 12 Wheat.

419 (6:678); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Cook v. Pennsylvania*, 97 U. S. 566 (24:1015); *Leisy v. Hardin*, 135 U. S. 100, 160 (34:128); *Champion v. Ames*, 188 U. S. 321 (47:492); *Northern Securities Co. v. United States*, 193 U. S. 197, 406 (48:676).

²⁰ *Veazie v. Moor*, 14 How. 568 (14:545); *Federalist*, Nos. 7 and 11.

§ 30. **The power to regulate commerce is vested in the legislative branch of the government.**—The power to regulate commerce is by the constitution vested solely in the legislative branch of the national government, and can be exercised by it alone;²¹ but, as shown by the practice of the government from its earliest history, and the adjudications of the supreme court, it is within the legal competency of congress to enact laws for the regulation of commerce, and to provide that they shall become operative, or that their operation shall be suspended, upon the ascertainment of a particular fact or the happening of a future event defined and specified in the statute, and to vest in the president or other executive officer the power and authority to ascertain and declare the fact or that the event has happened, and thus put into operation or suspend the operation of such commercial regulations in accordance with the terms of the statute.²² And the same principle has been applied to revenue legislation intended to secure commercial reciprocity with foreign nations.²³

§ 31. **The commercial power and the taxing power are distinct.**—The power to tax and the power to regulate commerce are given to congress in separate clauses of the constitution, and are separate, distinct and independent substantive powers; and congress derives its power to regulate commerce solely and alone from that provision of the constitution which declares that “Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”²⁴

§ 32. **Limitations upon the commercial power of congress.**—The power vested in congress “to regulate commerce with foreign nations, and among the federal states, and with the Indian tribes,” is a power complete in itself, is co-extensive with the subject embraced within the grant, and may be exer-

²¹ U. S. Const. art. I, sec. 8, cls. 3, 18.

²² *The Brig Aurora*, 7 Cranch, 382 (3:378); *Buttfield v. Stranahan*, 192 U. S. 470, 498 (48:525); 2 U. S. Stat. at L. ch. 24, 528; 2 U. S. Stat. at L. ch. 39, 605; 1 U. S. Stat. at L. ch. 53, 565; 2 U. S. Stat. at L. ch. 29, 379; 2 U. S. Stat. at

L. ch. 1, 411; *Field v. Clark*, 143 U. S. 649, 700 (36:294), collecting precedents of the practice of the government.

²³ *Field v. Clark*, 143 U. S. 649, 700 (36:294).

²⁴ *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Ferry Co. v. East St. Louis*, 107 U. S. 365, 378 (27:419).

cised to its utmost extent, and is subject to no limitations except those prescribed in the constitution.²⁵ The only constitutional limitation upon the power of congress to regulate commerce is that: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."²⁶ This provision is a limitation upon the revenue power as well as upon the commercial power; and it has been held that the preference or discrimination prohibited is not a preference or discrimination between individual ports within the same or different states, but a preference or discrimination between states.²⁷

§ 33. Constitutional provisions correlated to the commerce clause.—Whilst it is true that the taxing power and the commerce power of congress are separate, distinct and independent substantive powers,²⁸ yet it is also true that taxation is one of the means and methods of regulating commerce, and many state statutes imposing taxes have been held unconstitutional because they were regulations of commerce;²⁹ and, accordingly, the framers of the constitution inserted in that instrument provisions, which are correlated to the provision giving congress power to regulate commerce, and are in aid of and auxiliary to it,³⁰ limiting the power of the states to lay taxes, upon

²⁵ *Gibbons v. Ogden*, 9 Wheat. 1, (6:23); *Leisy v. Harden*, 135 U. S. 100, 160, (34:128).

²⁶ U. S. Const. Art. 1, sec. 9, cl. 6.

²⁷ *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 18 How. 421, 459 (15:435).

²⁸ *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Ferry Co. v. East St. Louis*, 107 U. S. 356, 378 (27:419).

²⁹ *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Philadelphia & Reading Railroad Co. v. Pennsylvania*, 15 Wall. 284, 299 (21:164); *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, 464 (26:1067); *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 502 (30:694); *Philadelphia & Southern Mail Steam Ship Co. v. Pennsylvania*,

122 U. S. 326, 347 (30:1200); *Welton v. Missouri*, 91 U. S. 275, 283 (23:347); *Leloup v. Port of Mobile*, 127 U. S. 640, 649 (32:313); *Western Union Telegraph Co. v. Seay*, 132 U. S. 472, 478 (33:409); *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S. 114, 121 (34:394); *McCall v. California*, 136 U. S. 104, 114 (34:391); *Crutcher v. Kentucky*, 141 U. S. 47, 62 (35:649); *Lyng v. Michigan*, 135 U. S. 161 (34:150); *Cook v. Pennsylvania*, 97 U. S. 566, 575 (24:1015); *Woodruff v. Parham*, 8 Wall. 123 (19:382); *Hinson v. Lott*, 8 Wall. 148 (19:387).

³⁰ *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Cook v. Pennsylvania*, 97 U. S. 566 (24:1015).

imports and exports and tonnage.³¹ This limitation of the taxing power of the states was necessary to secure the freedom of commerce, and to give complete efficacy to the commerce power vested by the constitution in the national government.³² No state has the right to lay a tax on interstate or foreign commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress.³³

§ 34. Commerce within the meaning of the constitution is a unit.—Although commerce is infinitely complex in its nature, and the subjects embraced by it are as varied and multifarious as the national life itself, yet, within the meaning of the constitution it is a unit; that is to say, commerce, when considered in its relation to the power of the federal government, is *one indivisible subject* of governmental power and regulation, and comprehends every species of commercial intercourse and transaction between the United States and foreign nations, and among the several states and with the Indian tribes, and the different branches of this commerce cannot be separated and distinguished for the purpose of excluding either or any of them from the operation of the regulating power of congress.³⁴

³¹ U. S. Const. art. I, sec. 10, cls. 2 and 3.

³² Cook v. Pennsylvania, 97 U. S. 566, 575 (24:1015); Brown v. Maryland, 12 Wheat. 419 (6:678).

³³ Leloup v. Port of Mobile, 127 U. S. 640, 649 (32:311); Lyng v. Michigan, 135 U. S. 161 (34:150); Cook v. Pennsylvania, 97 U. S. 566, 575 (24:1015); Philadelphia & Reading R. Co. v. Pennsylvania, 15 Wall. 232, 282 (21:146); Pensacola Tel. Co. v. West. U. Tel. Co., 96 U. S. 1 (24:708); Mobile County v. Kimball, 102 U. S. 691 (26:238); West. U. Tel. Co. v. Texas, 105 U. S. 460 (26:1067); Moran v. New Orleans, 112 U. S. 69 (28:653); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (29:158);

Brown v. Houston, 114 U. S. 622 (29:257); Walling v. Michigan, 116 U. S. 446 (29:691); Pickard v. Pullman Southern Car Co., 117 U. S. 34 (29:785); Wabash St. L. & P. R. R. Co. v. Illinois, 118 U. S. 557 (30:244); Robbins v. Shelby County Taxing District, 120 U. S. 489 (30:694); Philadelphia & S. M. Steamship Co. v. Pennsylvania, 122 U. S. 326 (30:1200); West. U. Tel. Co. v. Pendleton, 122 U. S. 347 (30:1187); Ratterman v. West. U. Tel. Co., 127 U. S. 411 (32:229); Brown v. Maryland, 12 Wheat. 419 (6:678).

³⁴ Gibbons v. Ogden, 9 Wheat. 1 (6:23, 69).

In this case, the great chief justice, while demonstrating the

§ 35. **The commercial power of congress does not extend to state commerce.**—There is a commerce wholly within the state, conducted exclusively within its jurisdiction and territory, and which does not affect other nations or states or the Indian tribes; and to this purely internal commerce of the state, the power of congress does not extend, but its regulation and control belong exclusively to the state.³⁵ Transportation of property for others, as an independent business, is commerce, irrespective of the purpose of the owner of the goods to sell or retain them after they have reached the point of destination; and where goods are shipped from one place to another in the same state, but the transportation is over a route which extends out of the state and then back into it, the transaction is one of interstate commerce and subject to the control of congress.³⁶ The transportation of goods by navigation upon the high seas between ports of the same state is commerce with foreign na-

proposition that the word "commerce" as used in the clause giving to congress the power to regulate commerce, comprehends navigation within the limits of every state in the Union, in so far as that navigation may be connected with interstate commerce, said: "The word used in the constitution, then comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'"

"To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several states, and with the Indian tribes.'"

"It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any

other, to which the power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." 9 Wheat. 191, 194.

³⁵ *Gibbons v. Ogden*, 9 Wheat. 1, 194 (6:69); *The Daniel Ball*, 10 Wall. 557 (19:999); *Hall v. De Cuir*, 95 U. S. 485 (24:574); *Telegraph Co. v. Texas*, 105 U. S. 460 (26:1067); *Wabash St. L. & Pac. R. Co. v. Illinois*, 118 U. S. 557 (30:244); *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 347 (29:636); *Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, 133 U. S. 587, 595 (33:784); *Greer v. Connecticut*, 161 U. S. 519 (40:793).

³⁶ *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617, 621 (47:333).

tions, and subject to regulation by congress,³⁷ and is not subject to regulation by the state, because to bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be during the entire voyage under the exclusive jurisdiction of the state.³⁸

§ 36. Commerce defined.—Within the meaning of the constitution, commerce with foreign nations and among the several states and with the Indian tribes, consists of intercourse and traffic, including in these terms the purchase, sale and exchange of commodities, navigation, the transportation and transit of persons and property, communication, and the transmission of intelligence.³⁹

§ 37. When the commercial power of congress is exclusive, and when paramount only.—The subjects upon which congress may act in the exercise of its commercial power are of two classes namely: (1) Those subjects which are national in their nature, character and sphere of operation, such as foreign and interstate commerce, which demand a single, uniform system, plan or rule of regulation for the whole country, operating alike and equally in all the states of the union, and in regard to such subjects the commercial power of congress is exclusive,⁴⁰ and (2) those subjects which are local in their nature,

³⁷ *Lord v. Goodall N. & P. S. S. Co.*, 102 U. S. 541 (26:224).

³⁸ *Pacific Coast S. S. Co. v. Railroad Commissioners*, 18 Fed. R. 10.

³⁹ *Gibbons v. Ogden*, 9 Wheat. 1, 194 (6:23); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Woodruff v. Parham*, 8 Wall. 123 (19:382); *Crandall v. Nevada*, 6 Wall. 35 (18:744); *United States v. Halliday*, 3 Wall. 418 (18:185); *Mobile County v. Kimball*, 102 U. S. 691 (26:238); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29:158); *The Pensacola Telegraph Co. v. The Western Union Telegraph Co.*, 96 U. S. 1, 24 (24:708); *Western Union Telegraph Co. v. Texas*, 460 (26:1067); *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347 (30:1187);

Ratterman v. Western Union Telegraph Co., 127 U. S. 411 (32:229); *Leloup v. Mobile*, 127 U. S. 640 (32:311); *Wabash St. L. & Pac. R. Co. v. Illinois*, 118 U. S. 557 (30:244); *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34 (29:785); *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617 (47:333); *Champion v. Ames*, 188 U. S. 321, 375 (47:492).

⁴⁰ *Leisy v. Hardin*, 135 U. S. 100, 160 (34:128); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 524 (31:700); *Wilkerson v. Rahrer*, 140 U. S. 545, 565 (35:572); *Lyng v. Michigan*, 135 U. S. 161, 167 (34:150).

character and sphere of operation, such as harbors, pilotage, the improvement of navigable rivers, bays and harbors, the establishment of beacons and buoys, the construction of bridges over navigable rivers, the erection of wharves, piers, docks, and other subjects of a kindred nature, which can be properly regulated only by special provisions adapted to their respective localities, and in regard to such subjects the states may act until congress interferes and supersedes their authority.⁴¹

§ 38. Failure of congress to act in regard to any commercial subject of a national nature is a declaration that as to such matter commerce shall remain free.—The failure of congress to enact legislation regulating any commercial subject which is national in its nature, character and sphere of operation, requiring uniform regulation, such as foreign and interstate commerce, is equivalent to a declaration that commerce as to such matter, shall remain free.⁴²

§ 39. Powers expressly prohibited to the states.—The powers expressly prohibited by the constitution to the states are of two classes, namely: (1) Powers absolutely and unconditionally prohibited to the states; (2) powers conditionally prohibited

⁴¹ *Cooley v. Port Wardens*, 12 How. 299, 319 (13:996); *Mobile County v. Kimball*, 102 U. S. 691, 697 (26:238); *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678 (27:442); *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691 (27:584); *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 (30:237); *Smith v. Alabama*, 124 U. S. 465 (31:508); *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96 (32:352); *Huse v. Glover*, 119 U. S. 543, 550 (30:487); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 17 (31:629); *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (7:412); *Pollard v. Hogan*, 3 How. 229 (11:573); *Passaic Bridges*, 3 Wall. 782 (16:799); *Gilman v. Philadelphia*, 3 Wall. 724 (18:99); *Pound v. Turk*, 95 U. S. 459 (24:525); *Cardwell v. Ameri-*

can Bridge Co., 113 U. S. 205 (29:959); *Hamilton v. Vicksburg S. & P. R. Co.*, 119 U. S. 280, 285 (30:393); *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 297 (31:149); *Lakeshore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 238 (43:702); *Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 114 U. S. 196, 218 (29:158); *Ex parte McNeill*, 13 Wall. 236; *Wilson v. McNamee*, 102 U. S. 572; *Olsen v. Smith*, 195 U. S. 332, 345 (49:224).

⁴² *Leisy v. Hardin*, 135 U. S. 100, 160 (34:128); *Mobile County v. Kimball*, 102 U. S. 691 (26:238); *Brown v. Houston*, 114 U. S. 622, 631 (29:257); *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30:244); *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (30:694).

to the states—that is, powers which the states are forbidden to exercise “without the consent of the congress.” The powers embraced in the first class are: “No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contracts, or grant any title of nobility.” The powers embraced in the second class are: “No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports and exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and the control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”⁴³

§ 40. **The reserved powers of the states.**—The tenth amendment to the federal constitution declares that: “The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.” In this country, the powers of sovereignty are divided between the government of the union and those of the states, and they are each sovereign with respect to the objects committed to it, and neither is sovereign with respect to the objects committed to the other;⁴⁴ and there is a concurrent right of legislation in the states and in the United States, except as both are restrained by the constitution of the United States.⁴⁵ The states have the same undeniable and unlimited jurisdiction over all persons and things within their territorial limits, as any sovereign nation, where that jurisdiction is not surrendered or restrained by the federal constitution; and none of those powers which relate to merely municipal legislation have been so surrendered or restrained.⁴⁶

⁴³ U. S. Const. Art. 1 sec. 10, cl. 1, 2, 3

⁴⁴ *McCulloch v. Maryland*, 4 Wheat. 316 (4:579).

⁴⁵ *Mayor v. Miller*, 11 Pet. 102 (9:648).

⁴⁶ *Dobbins v. Comrs.* 16 Pet. 435 (10:1022).

§ 41. **Sovereignty of the states over their navigable waters and the soils beneath them.**—When the revolution took place, the people of each state became themselves sovereign, and in that character they held, respectively, the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by them through the constitution to the general government;⁴⁷ and the grant, contained in the constitution, to the United States, of cognizance of all cases of admiralty and maritime jurisdiction cannot be construed into a cession of the navigable waters within the jurisdiction of a state.⁴⁸ It is the settled rule of law, established by repeated decisions of the supreme court of the United States, that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders; and upon the acquisition of territory from Mexico the United States acquired title to tide lands equally with the title to upland, but with respect to the former they held it in trust for the future states that might be erected out of such territory. But this rule does not apply to tide lands that had by the antecedent government been previously granted to other parties, or subjected to trusts which would require their disposition in some other way, and when the United States acquired California from Mexico by the Treaty of Guadaloupe-Hidalgo they were bound under the eighth article of that treaty to protect all rights of property emanating from the Mexican government previous to the treaty; however, irrespective of any such provisions in the treaty, the obligations resting upon the United States, in that respect, under the principles of international law, would have been the same.⁴⁹

§ 42. **Same—Tide waters—The great lakes.**—It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the

⁴⁷ *Martin v. Waddell*, 16 Pet. 367 (10:997); *Shineley v. Bowlby*, 152 U. S. 1, 58 (38:331).

⁴⁸ *United States v. Beavans*, 3 Wheat. 336 (4:404).

⁴⁹ *Knight v. United Land Association*, 142 U. S. 161, 216 (35:974) and authorities there cited.

limits of the several states, belong, in trust for public use, to the respective states within which they are situated, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. The same doctrine is held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over, and ownership by the state, of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of the lakes.⁵⁰

§ 43. **Same—Mississippi river.**—The act of congress authorizing the people of the territory of Minnesota to form a state constitution, and making the Mississippi river a common highway and forever free as well to the inhabitants of said state as to all other citizens of the United States, did not impair the title and jurisdiction of the state over the navigable waters within her boundaries more than rights of that nature are limited with regard to the original states; and the title and rights of riparian owners and proprietors upon the banks of the Mississippi river are to be settled and determined by the laws of the states within which the lands are situated and included, respectively.⁵¹

§ 44. **Riparian rights determined by state law.**—It is the settled doctrine of this country that the riparian titles and rights of owners of land upon the navigable waters are settled and determined by the local law of the state where the question arises, and the courts of the United States in adjudicating upon such titles and rights follow the statutes of the state and the settled decisions of its highest courts.⁵²

⁵⁰ Illinois Central R. Co. v. People of The State of Illinois. 146 U. S. 387. 476 (36:1018).

Power Co. v. Board of Water Comrs., 168 U. S. 343, 374 (42:497).

⁵¹ St. Anthony Falls Water

⁵² St. Anthony Falls Water

§ 45. **Riparian rights subordinate to the commercial power of congress.**—The commercial power vested by the constitution in congress includes the power to prescribe the rules by which commerce is to be governed, comprehends navigation within the limits of every state in the union, so far as that navigation may be in any manner connected with commerce with foreign nations or among the several states or with the Indian tribes, and extends to the control of the navigable waters and the land beneath them not only for the purposes of navigation but also for the purpose of constructing piers, bridges, locks, dams, canals and all other instrumentalities of commerce which in the judgment of congress may be necessary or expedient; all navigable waters and the submerged soil are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and the submerged soil is in the various states and individual owners under them, such title is always subject to the easement and servitude of navigation as a means and instrument of that commerce, the regulation of which is by the constitution vested in the national government; and the prohibition contained in the fifth amendment to the constitution against the taking of private property for public use without just compensation has no application to the case of a land owner bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland and which pier was erected by the United States not with intent to impair the rights of riparian owners but for the purpose only of improving the navigation of the river. The states hold their navigable rivers and the soil beneath them under a high public trust, to preserve them forever free as public highways, subject only to the commercial power of congress; and the legal title and riparian rights which, under the local law and the grant of the state, became vested in the riparian owner, are held by him subject to the same public trust, and, therefore, subordinate to the power of congress to control and use the soil under the streams whenever the necessities of navigation

Power Co. v. Board of Comrs., 58 (38:331), where all the cases
168 U. S. 349, 374 (42:497); are examined.
Shinely v. Bowlby, 152 U. S. 1,

and commerce shall demand it. The right of congress to regulate commerce, and, as an incident, to regulate navigation, remains unaffected by the question as to whether the title to the submerged soil is in the state or is in the owner of the shore. A distinction must be recognized between that which is *jus privatum* and that which is *jus publicum*; the private right is subordinate to the public right, and the riparian owner takes and holds such proprietary rights as are consistent with the public right of navigation and the control of congress over that right. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and, for the purposes of the exercise of the commercial power, it is immaterial whether congress has or has not the ownership of, and dominion over such waters and the land under them.⁵³

§ 46. Authority of a state to maintain bridge across navigable stream.—The commercial power of congress is exclusive of state authority only when the subjects upon which it is exerted are national in their nature, character, and sphere of operation, and admit and require uniformity of regulations affecting alike all the states, and when the subjects of that power are local in their nature or sphere of operations, or constitute mere aids to commerce, the state may provide for their regulation and management until congress intervenes and supersedes their action; and, until congress acts, the states within which navigable streams lie have the power to construct and maintain bridges over them. The states have full power to regulate within their limits matters of internal police, which embraces, among other things, the construction, repair and maintenance of roads and bridges, and the establishment of ferries; the states are more likely to appreciate the importance of such means of internal communication, and to provide for their proper management, than a government at a distance; and while, as to bridges over navigable streams, the power of the state is subordinate to that of congress, yet until congress

⁵³ *Scranton v. Wheeler*, 179 U. S. 141, 190 (45:126); *S. C. 6 C. C. A.* 585, 57 Fed. Rep. 803 (opinion by Lurton); *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 642 (25: 336); *Gibson v. United States*, 166 U. S. 269, 271 (41:996); *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 9, 20.

has acted the power of the state is plenary; but when congress acts directly in regard to bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the stream. But where the state has authorized the construction of a bridge across a navigable stream within its limits, and congress has taken no action in regard thereto, the courts of the United States will not grant an injunction against the maintenance of such bridge.⁵⁴ Bridges which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than would ever be transported on the water obstructed. It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of congress, when the power of the state shall be exercised within the sphere of commercial power which belongs to the national government.⁵⁵

§ 47. Same—Federal statute requiring assent of the federal government.—By recent federal legislation, the assent of both the state and federal governments are necessary to the construction of any bridge across navigable streams, the plans of which must be submitted to and approved by the chief engineers and the secretary of war; and the plans, when once approved, cannot be deviated from, unless the modifications of the plans are first submitted and approved by the chief engineers and secretary of war.⁵⁶ The effect of this legislation, reasonably interpreted, is to make the erection of bridges across a navigable river, within the limits of a state, depend

⁵⁴ *Caldwell v. American River Bridge Co.*, 113 U. S. 205, 212 (28:959); *Gilman v. Philadelphia*, 3 Wall. 713 (18:96); *Escanaba Transfer Co. v. Chicago*, 107 U. S. 678 (16:799); *Lakeshore & C. R. Co. v. Ohio*, 165 U. S. 366, 368

(41:748); *Cummings v. Chicago*, 188 U. S. 410, 431 (47:525).

⁵⁵ *Gilman v. Philadelphia*, 3 Wall. 713 (18:96).

⁵⁶ 30 U. S. Stat. at L. 1121, 1151, Comp. Stat. 1901, p. 3541, 6 Fed. Stat. Anno. 805.

upon the concurrent or joint assent of both the national government and the state government.⁵⁷

§ 48. Power of the states to improve their harbors, bays and navigable rivers.—The improvement of harbors, bays and navigable rivers within the state is a local and limited regulation of commerce, not requiring uniformity throughout the union, and the control of congress over such waters is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. The states have full control over their purely internal commerce; and to promote its growth and insure its safety, they have an undoubted power to remove obstructions from their harbors, rivers and bays and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States or defeat any system for the improvement of their navigation provided by the general improvement; and a state statute, such as that of Alabama for the improvement of the river, bay and harbor of Mobile, is not invalid, and the courts of the United States will administer such state laws and enforce any contract rights accruing under them between competent parties.⁵⁸

§ 49. Same—Federal statutes requiring assent of the federal government.—By recent federal legislation, the concurrent or joint assent of both the federal and state governments is necessary to the erection of any wharf or other structure in a navigable water of the United States, which is entirely within the limits of a state.⁵⁹

§ 50. Distinction between municipal sovereignty and national sovereignty.—In one of the early cases upon the subject of the sovereignty and dominion of the respective states over their navigable waters, the United States supreme court, speaking

⁵⁷ *Cummings v. Chicago*, 188 U. S. 410, 431 (47:525); *Lakeshore & C. R. Co. v. Ohio*, 165 U. S. 366, 368 (41:748).

⁵⁸ *Mobile County v. Kimball*, 102 U. S. 691, 707 (26:238); *Navigation Co. v. United States*, 148 U. S. 333 (37:470); *Lake Shore & C. Ry. Co. v. Ohio*, 165 U. S. 365, 369 (41:747); *Cummings v. Chicago*,

188 U. S. 410 (47:525); *Montgomery v. Portland*, 190 U. S. 89, 107 (47:965); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1 (31:629).

⁵⁹ 30 U. S. Stat. at L. ch. 425, sec. 10, p. 1151, 6 Fed. Stat. Anno. 813; *Montgomery v. Portland*, 190 U. S. 89, 107 (47:965); *Cummings v. Chicago*, 188 U. S. 410 (47:525).

through Mr. Justice McKinley, quite appositly drew the distinction between municipal sovereignty and national sovereignty, and laid down the doctrine that the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a state or elsewhere, except in the cases expressly provided in the constitution.⁶⁰ Chief Justice Marshall had previously decided that the jurisdiction of a state is coextensive with its territorial limits, and that the grant by the constitution to the federal judiciary of admiralty jurisdiction was not a cession of the navigable waters and the soils beneath them which lie within the states, and that the federal courts had no jurisdiction of a murder committed in Boston harbor;⁶¹ and the supreme court has by an unbroken line of decisions firmly established the principle that the municipal jurisdiction of the states over their respective navigable waters and the soils beneath is just as full and ample as over their upland territory, subject only to the commercial power of congress.⁶²

§ 51. Admiralty jurisdiction of the United States over the public navigable lakes and rivers of the states.—While it is true that the states, respectively, are vested with sovereignty over their navigable waters, yet it is also true that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States is not limited to tide waters, but extends to all public navigable rivers and lakes, although they are situated within the territorial limits of the respective states.⁶³

⁶⁰ Pollard v. Hagan, 3 How. 230 (11:565).

⁶¹ United States v. Beavans, 3 Wheat. 337 (4:404).

⁶² United States v. Beavans, 3 Wheat. 337 (4:404); Smith v. Maryland, 18 How. 76 (15:271); McCready v. Virginia, 94 U. S. 394 (24:248); Manchester v. Massachusetts, 139 U. S. 260, 263 (35:165); Lawton v. Steele, 152 U. S. 138 (38:389); State v. Harub, 95 Ala. 182, 36 Am. St. Rep. 197, 15 L. R. A. 763; Commonwealth v. Manchester, 152 Mass.

243, 23 Am. St. Rep. 831; People v. Welch, 141 New York, 271, 38 Am. St. Rep. 795, 24 L. R. A. 119; Steamboat Co. v. Chace, 16 Wall. 531 (21:371).

⁶³ The Genesee Chief v. Fitzhugh, 12 How. 443 (13:1058); Ex Parte Garnett, 141 U. S. 1, 18 (35:631); Fretz v. Bull, 12 How. 466 (13:1068); Jackson v. The Magnolia, 20 How. 296 (15:909); Nelson v. Leland, 22 How. 48 (16:269); The Propeller Commerce, 1 Black, 574 (17:107); The Hine v. Trevor, 4 Wall. 555 (18:

§ 52. **State pilotage laws—Administered in federal courts.**—State pilotage laws are regulations of commerce, but they are constitutional and valid, though subject to the commercial power of congress, and a right arising under such laws will be enforced in the admiralty courts of the United States. At the time the constitution took effect, pilotage laws existed in several of the states, and were subsequently enacted in others, and in all such states those laws have been changed from time to time according to the will of their respective legislatures; suits in the state courts have been founded on them and recoveries had and many such cases reported in the state reports, and in none of them was a question ever raised or a doubt expressed as to the validity of those laws or the authority of the states to enact them; and congress has by repeated legislation recognized the validity of those laws of the states.⁶⁴

§ 53. **Constitutional power of the states to lay duties on imports and exports for executing their inspection laws.**—There is in the federal constitution reserved to the states, respectively, the power, subject to the revision and control of congress, to lay a tax on imports and exports, for the purpose of raising a revenue to defray the expenses absolutely necessary in the execution of their inspection laws. The constitution declares that: "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the congress."⁶⁵ This power reserved to the states, by which they are permitted to levy a tax on imports and exports for executing their inspection laws, is an exception

451); *The Belfast*, 7 Wall. 624 (19:266); *The Eagle*, 8 Wall. 15 (19:365); *The Daniel Ball*, 10 Wall. 557 (19:999); *The Montello*, 20 Wall. 430 (22:391); *Ex Parte Boyer*, 109 U. S. 629 (27:1056).

⁶⁴ *Ex parte McNiel*, 13 Wall. 236, 243 (20:624); *Cooley v. Board of Wardens*, 12 How. 299; *Olsen v. Smith*, 195 U. S. 332, 345 (49:224).

⁶⁵ U. S. Const. art. I, sec. 10, cl.

2; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 361 (43:191); *Minnesota v. Barber*, 136 U. S. 313 (34:455); *Plumley v. Massachusetts*, 155 U. S. 461 (39:223); *Schollenberger v. Pennsylvania*, 171 U. S. 1, 30 (43:49); *Crutcher v. Kentucky*, 141 U. S. 47 (35:649); *Steiner v. Ray*, 84 Ala. 93; *Turner v. Maryland*, 107 U. S. 38 U. S. (27:370).

to the general prohibition on the states contained in the constitution, restraining them from laying such imposts or duties, and without it the power would not reside in the states; the exception was made, because without it the tax would have been within the prohibition.⁶⁶

§ 54. The subject-matter of inspection laws—Do not operate upon persons.—The constitutional provision authorizes the states to lay a tax on “imports” and “exports” for executing their inspection laws. The words, “imports” and “exports,” have never, in this country, neither in the colonies before the revolution, nor since that time, been held to embrace or operate upon anything but personal property, they are not applicable to free human beings, and a state law imposing a tax or duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the ports of the state enacting the law, is not an inspection law, but a regulation of foreign commerce, and is repugnant to the federal constitution, and, therefore, invalid.⁶⁷

§ 55. What articles are subject to state inspection laws.—The decisions of the supreme court of the United States have defined four classes of articles or commodities which are subject to the operation of state inspection laws, namely: (1) articles produced in a state, and which are to be retained there for domestic use and consumption, and local commerce; (2) articles produced in a state and which are to be exported to a foreign country; (3) articles imported into a state from a foreign country; and (4) articles shipped into one state from another state.⁶⁸

§ 56. The object of state inspection laws.—Some of the objects of state inspection laws are: (1) To improve the quality of domestic products, and to prepare and fit them for exportation and for becoming articles of foreign and interstate commerce, and to preserve the credit of our exports in foreign

⁶⁶ *Brown v. Maryland*, 12 Wheat. 419 (6:678).

⁶⁷ *People v. Compagnie Gen. Transatlantique*, 107 U. S. 59, 63 (27:383); *Henderson v. Mayor of New York*, 92 U. S. 259, 275 (23:543).

⁶⁸ *Patapsco Guano Co. v. Board*

of Agriculture, 171 U. S. 345, 361 (43:191); *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Turner v. Maryland*, 107 U. S. 57 (27:378); *Neilson v. Garza*, 2 Woods, 290, Fed. Cas. 10,091; *Plumley v. Massachusetts*, 155 U. S. 461 (39:223).

markets; (2) to fit domestic products for domestic use, consumption and local commerce; (3) to ascertain and determine the fitness of both domestic and imported articles, for domestic use, consumption and local commerce; (4) to secure the safety of domestic articles while they remain in the country and before they have become articles of foreign or interstate commerce, and to identify them as the growth and products of the state; and (5) to protect the public health, morals and safety, and to prevent and suppress frauds upon the community and imposition on the public generally, in the sale of articles for domestic use, whether such articles be domestic products or foreign or interstate importations.⁶⁹

§ 57. **The method and means of executing inspection.**—A product or an article of commerce is inspected by looking at it, or by tactual manipulation, or by weighing or measuring the package; or by opening the package and examining its contents and taking out a sample and certifying that it is merchantable or unmerchantable; or by chemical or scientific analysis; or by applying to it at once some crucial test, which, according to the known laws of nature and the established laws of commerce, is decisive of the character of the article.⁷⁰ And inspection laws may require that products shall be put up in packages of a certain form and of certain prescribed dimensions, and made of certain materials, either on account of the nature and character of the product, or to enable the state to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported; and may require such products to be carried to warehouses of its own designation for inspection, and the packages containing them tagged, numbered and branded, and the name of the owner or consignee placed thereon; and may require the owner or consignee to pay storage on such products while in the warehouse, the

⁶⁹ *Turner v. Maryland*, 107 U. S. 38, 59 (27:370); *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 361 (43:191); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Gibbons v. Ogden*, 9 Wheat. 1; *Neilson v. Garza*, 2 Woods, 290, Fed. Cas. 10,091; *Plumley v. Massachusetts*, 155 U. S. 461 (39:223).

⁷⁰ *People v. Compagnie Gen. Transatlantique*, 107 U. S. 59, 63 (27:383); *Turner v. Maryland*, 107 U. S. 38, 59 (27:370); *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 361 (43:191); *Plumley v. Massachusetts*, 155 U. S. 461 (34:455).

cost of inspection, whether by analysis or otherwise, and the cost of labor in receiving and discharging them.⁷¹

§ 58. Distinction between the power to enact inspection laws and the power to levy duty for their execution.—There is a clear and substantial distinction between the power of the states to enact inspection laws, and the power to lay a tax on imports and exports for their execution; the former is derived from the general powers of municipal government reserved to the states, whilst the latter is derived from the exception carved out of the general prohibition on the states against the levy of duties upon imports and exports. The existence of the substantive power to enact the law is a condition precedent to the incidental power to levy the tax for its execution. If the inspection law enacted by the state be in conflict with the commercial power of the United States, or any other power vested by the constitution in the federal government, the state enactment will be void and the tax levy falls with it.⁷² The enactment of inspection laws by the states is sometimes referred to their general powers of municipal legislation, and sometimes it is referred to what is called their police power.⁷³

§ 59. Commercial classification of the subjects of inspection laws.—The commercial status of the articles which are the subjects of inspection laws and upon which they operate are: (1) Articles which at the time of inspection have not become articles of commerce;⁷⁴ and (2) articles which have become articles of commerce, by having been brought into one state from another or from a foreign country.⁷⁵

§ 60. Inspection laws act on articles of commerce in the exercise of the police powers of the state.—As shown in a pre-

⁷¹ *Turner v. Maryland*, 107 U. S. 38, 59 (27:370); *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 361 (43:191); *Plumley v. Massachusetts*, 155 U. S. 461 (34:455).

⁷² *People v. Compagnie Gen. Transatlantique*, 107 U. S. 59, 63 (27:383); *Railroad Co. v. Husen*, 95 U. S. 465 (24:527).

⁷³ *Patterson v. Kentucky*, 97 U. S. 501 (24:1115); *Minnesota v.*

Barber, 136 U. S. 313, 330 (34:455); *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 361 (43:193).

⁷⁴ *Turner v. Maryland*, 107 U. S. 38, 59 (27:370).

⁷⁵ *Woodruff v. Purham*, 8 Wall. 123 (19:382); *Pittsburgh Coal Co. v. Louisiana*, 156 U. S. 590, 600 (39:544); *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. (43:191).

vious section,⁷⁶ state inspection laws operate upon articles which have become articles of foreign and interstate commerce or which have been brought from a foreign country or from one state into another, and which have thereby been brought under the commercial power of congress. In such cases, the valid state inspection laws proceed from and are an exercise of that power of governmental self-protection reserved to the states, commonly called the police power, and which must be exercised in such manner as not to infringe or trench upon the commercial power of the national government.⁷⁷ The acknowledged power of the states to protect the morals, health and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority; but in view of the complex system of government which exists in this country, presenting, as it does, the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the union, the judiciary of the United States will not strike down a legislative enactment of a state, especially if it has direct connection with the social order, the health, and the morals of its people, unless such legislation plainly and palpably violates some right or power granted or secured by the federal constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern. It is the settled doctrine of the supreme court of the United States that, while the reserved police powers of the states cannot control the prohibitions of the federal constitution nor the powers of the government created by it, yet the grant to congress of authority to regulate foreign and interstate commerce did not involve a surrender by the states of their police power; and it was in contemplation of the continued existence and operation of the separate system of laws, from whatever source derived, existing at the time in each state of the union, and regulating the rights and duties of all the inhabitants within its jurisdiction, including those

⁷⁶ Ante sec. 55.

⁷⁷ *Plumley v. Massachusetts*, 155 U. S. 461 (39:223); *Patapsco Guano Co. v. Board of Agricul-*

ture, 171 U. S. 345, 361 (43:191); *Schollenberger v. Pennsylvania*, 171 U. S. 1, 30 (43:49).

engaged in interstate commerce, that the constitution was framed and adopted, and the government of the United States, with all its powers, was ordained and established;⁷⁸ and it has, consequently, been held by the supreme court that a state may enact laws and prescribe regulations applicable to carriers engaged in interstate and foreign commerce, to insure the safety of persons carried by them, as well as the safety of persons and things liable to be affected by their acts while within the territorial limits of the state.⁷⁹

§ 61. **Same—Harmony with the commercial power.**—The supreme court of the United States, from its organization, has, in its decision in all cases brought before it involving the question, steadily and assiduously avoided any conflict between the commercial power of the general government and the police power of the states, with equal fidelity maintaining the supremacy of the former in the exercise of the powers vested in it by the constitution, and preserving unimpaired the sovereignty of the latter in the powers reserved to them; and that court has uniformly recognized state legislation, which is designed for legitimate purposes, as not, within the meaning of the constitution, necessarily infringing upon the commercial power or any other power which has been confided expressly or by implication to the national government. It is an axiom in our system of government, established by an unbroken line of decisions, that the power of the state to impose restraints and burdens upon persons and property in 'conservation and promotion of the public health, morals, safety, good order and prosperity, is a power originally and always belonging to the states, and which was not surrendered by them to the general government, nor directly restrained by the constitution of the United States; and the exercise of this power by the states is essentially exclusive, for "it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government." ⁸⁰ The commercial power of the general govern-

⁷⁸ *Plumley v. Massachusetts*, 155 U. S. 461, 482 (39:223); *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650 (29:516); *Smith v. Ala.*, 124 U. S. 465, 476 (31:508).

⁷⁹ *Smith v. Ala.* 124 U. S. 465, 476 (31:508).

⁸⁰ *Wilkerson v. Rahrer*, 140 U. S. 545, 565 (35:572); *Barbier v. Connolly*, 113 U. S. 27, 31 (28:924); *Smith v. Ala.* 124 U. S. 465, 476

ment was not intended to secure, and it does not secure to citizens of one state the privilege of deceiving and defrauding the public and committing an offense against society in another state by means of interstate traffic; and it is within the power of a state, without violating any right secured by the federal constitution, and without infringing the authority of the general government, to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy, although such manufactured compound may be in itself a wholesome article of food, and has been recognized by congress as a legitimate article of commerce, and has been shipped from the state where it was manufactured into another state and offered for sale in the original package, marked and stamped as required by the laws of the state where it is offered for sale, and the manufacturer has complied with all the requirements of a federal statute regulating the sale of such manufactured article.⁸¹ But, while a state in the execution of its police powers has the right to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state, yet the state has no right to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is a healthful and wholesome article of food, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud and illegal gain, and the inspection and analysis of the article for the purpose of detecting the adulteration would be difficult and burdensome.⁸² Nor can a state

(31:508); *Sherlock v. Alling*, 93 U. S. 99, 103 (23:819); *Plumley v. Massachusetts*, 155 U. S. 461, 482 (39:223); *Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence*, 173 U. S. 285, 338 (43:702); *Escanaba*

Co. v. Chicago, 107 U. S. 678, 683 (27:442).

⁸¹ *Plumley v. Massachusetts*, 155 U. S. 461, 482 (39:223).

⁸² *Schollenberger v. Pennsylvania*, 171 U. S. 1, 30 (43:49).

make discrimination against the products and industries of some of the states in favor of its own products or those of other states.⁸³ The states may, in the exercise of the police power, legislate with reference simply to the public convenience, subject, of course, to the condition that such legislation be not inconsistent with the federal constitution, nor with any act of congress passed in pursuance of that instrument, nor in derogation of any right guarantied or secured by it.⁸⁴ Legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of the people, but which by their necessary operation affect to some extent or for a limited time the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the union until they are superseded and displaced by some act of congress passed in execution of the power granted to it by the constitution. Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the same field occupied by those engaged in such commerce. Such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state by which it was established, and therefore not invalid by force alone of the constitution of the United States.⁸⁵

⁸³ *Brimmer v. Rebam*, 138 U. S. 78, 82 (34:862); *Voight v. Wright*, 141 U. S. 62, 66 (35:638); *Minnesota v. Barber*, 136 U. S. 313, 322 (34:455); *Walling v. Michigan*, 116 U. S. 446, 459 (29:691); *Han-*

nibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473 (34:527).

⁸⁴ *Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence*, 173 U. S. 285, 338 (43:702).

⁸⁵ *Hennington v. Georgia*, 163 U.

§ 62. **Quarantine laws enacted by the states.**—While it is true that the power vested in congress to regulate commerce between the states and with foreign nations is a power complete in itself, acknowledging no limitations other than those prescribed by the constitution, and that where the action of the states in the exercise of their reserved powers comes into collision with it the latter must give way, yet it is also true that quarantine laws, although they affect foreign and interstate commerce, belong to that class of state legislation which is valid until displaced by congress; and the legislation of congress bearing on the subject does not purport to abrogate, and has not abrogated the quarantine laws of the several states, but, on the contrary, has, from the foundation of the government down to the present time, recognized the state systems of quarantine regulations, and is subject to and in aid of them. The matter of quarantine is one in which the rules that should control and govern may in many respects be different in different localities, and for that reason may be better understood and more wisely established by the local authorities.⁸⁶

§ 63. **State action incidentally affecting foreign and interstate commerce.**—While it is true that the federal and state governments are independent of each other, and each is supreme within its constitutionally appointed sphere of action,⁸⁷ and the constitution has vested in the former the exclusive power to regulate foreign and interstate commerce, yet it is also true that the two governments constitute one composite governmental system, both acting, often simultaneously and at the same place, upon the same public interests and private rights, and upon subjects and instrumentalities of foreign and interstate commerce; and, accordingly, by inevitable necessity, resulting from the inherent and essential nature of the system, the execution of the municipal and police powers of the state incidentally affect foreign and interstate commerce, but it is held by the settled decisions that such state action is not a

S. 299, 317 (41:166); *Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence*, 173 U. S. 285, 338 (43:702), and authorities there cited.

⁸⁶ *Compagnie Francaise v. State Board of Health, Louisiana*, 186 U.

S. 380, 401 (46:1209); *Louisiana v. Texas*, 176 U. S. 1, 21 (44:347); *Morgan's R. R. & Steamship Co. v. Louisiana*, 118 U. S. 455, 467 (30:237).

regulation of foreign and interstate commerce, "within the meaning of the constitution," where the state regulation has a real and substantial relation to matters which are the subjects of legitimate state control, and does not go beyond the necessities of the case.⁸⁸

⁸⁷ Ante sec. 17.

⁸⁸ *Compagnie Francaise v. State Board of Health, Louisiana*, 186 U. S. 380, 401 (46:1209); *Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence*, 173 U. S. 285, 338 (43:702); *Hennington v. Georgia*, 163 U. S. 299, 317 (41:166); *Gilman v. Philadelphia*, 3 Wall. 713, 729 (18:96);

Western Union Telegraph Co. v. James, 162 U. S. 650, 662 (40:1150); *Richmond & A. Railroad Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 316 (42:759); *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 631 (41:853).

CHAPTER III.

THE BASES AND SOURCES OF THE LAW AND JURISPRUDENCE ADMINISTERED IN THE CIRCUIT COURTS OF THE UNITED STATES.

§ 64. Two systems of law administered in the circuit courts of the United States.

65. Federal and state laws form one composite system of jurisprudence for the state.

66. The supreme law of the land.

67. Same—Treaties; their na-

ture—New principal introduced by the constitution.

68. The United States government vested with power to execute the federal laws on every foot of American soil.

69. Power of federal judiciary to declare state law void.

§ 64. Two systems of laws administered in the circuit courts of the United States.—As a corollary of the dual system of government in this country, there are two systems of laws and jurisprudence administered in the circuit courts of the United States, namely: 1. The constitutional, and statutory law and treaties of the United States, and the body of jurisprudence which has been erected upon them as a foundation by the judicial decisions.¹ 2. The constitutional, and statutory law, and the common law of the several states, and the body of jurisprudence which has been erected on them as a foundation by the judicial decisions of the highest courts of the states;² to

¹ U. S. Const. art. VI, paragraph 2; *Ableman v. Booth*, 21 How. 516 (16:173).

² Original judiciary act, sec. 34
1 U. S. Stat. at L. ch. 20, pp. 73, 79; U. S. R. S. sec. 721; *Orleans v. Phœbus*, 11 Pet. 175 (9:677); *Fitch v. Creighton*, 24 How. 159 (16:596); *Beauregard v. New Orleans*, 18 How. 497 (15:469); *Christy v. Pridgeon*, 4 Wall. 196 (18:322); *Swift v. Tyson*, 16 Pet. 1 (10:865); *United States v. Reid*, 12 How. 361 (13:1023);

Railroad Co. v. Whitton, 13 Wall. 270 (20:591); *Bank of Augusta v. Earle*, 13 Pet. 519 (10:274); *Hinde v. Vattier*, 5 Pet. 398 (8:168); *Yonley v. Lavender*, 21 Wall. 276 (22:536); *Walker v. Beal*, 9 Wall. 743 (19:814); *Kendall v. Creighton*, 23 How. 90 (16:419); *Britton v. Thornton*, 112 U. S. 526 (28:816); *Miles v. Caldwell*, 2 Wall. 35 (17:755); *Equator M. & S. Co. v. Hall*, 106 U. S. 86 (27:114); *Smeed v. Wister*, 8 Wheat. 690 (5:717); *Orvis v. Pow-*

which may be added commercial law and general jurisprudence, and in regard to which federal courts exercise their own judgment and are not bound by state decisions.³ These

ell, 98 U. S. 176 (25:238); *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627 (24:858); *Metropolitan Nat. Bank of New York v. Connecticut Mut. Life Ins. Co.*, 24 L. E. 1011; *Swift v. Smith*, 102 U. S. 442 (26:193); *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 57 (27:648); *McClunney v. Silliman*, 3 Pet. 270 (7:676); *Bank v. Dalton*, 9 How. 522 (13:242); *Dulles v. Jones*, 9 How. 530 (13:245); *Amy v. Dubuque*, 98 U. S. 470 (25:228); *Moore v. Citizens National Bank of Piqua*, 104 U. S. 625 (26:870); *Davie v. Briggs*, 97 U. S. 628 (24:1086); *Ross v. Duval*, 13 Pet. 45 (10:51); *Lanahan v. Sears*, 102 U. S. 318 (26:180); *Bauserman v. Blount*, 147 U. S. 647 (37:316); *New York Fourth Nat. Bank v. Franklin*, 120 U. S. 747 (30:825); *Williams v. Eggleston*, 170 U. S. 304 (42:1047); *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194 (41:683); *Bardon v. Land & R. Imp. Co.*, 157 U. S. 327 (39:719); *Halstead v. Buster*, 140 U. S. 273 (35:484); *Gormley v. Clark*, 134 U. S. 338 (33:909); *Clement v. Packer*, 125 U. S. 309 (31:721); *Ridings v. Johnson*, 128 U. S. 212 (32:401); *Hanrick v. Patrick*, 119 U. S. 156 (30:396); *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258 (33:128); *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254 (35:1004); *Butz v. Muscatine*, 8 Wall. 575 (19:490); *Christy v. Prigdon*, 4 Wall. 196 (18:322); *Shelby v. Guy*, 11 Wheat. 361 (6:495); *League v. Egery*, 24 How. 264 (16:655); *McKeen v. Delancy*, 5

Cranch, 22 (3:25); *Williamson v. Suydam*, 6 Wall. 723 (18:967); *Thatcher v. Powell*, 6 Wheat. 119 (5:221); *St. John v. Chew*, 12 Wheat. 153 (6:583); *Henderson v. Griffin*, 5 Pet. 151 (8:79); *Ross v. McLung*, 6 Pet. 283 (8:400); *Bondurant v. Watson*, 103 U. S. 281 (26:447); *Hammond & Co. v. Hastings*, 134 U. S. 401 (33:960); *Morely v. Lake Shore & M. S. R. Co.*, 146 U. S. 162 (36:925); *McElvaine v. Brush*, 142 U. S. 155 (35:971); *Cook County v. Calumet & C. Canal & D. Co.*, 138 U. S. 635 (34:1110); *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587 (33:784); *Lincoln County v. Luning*, 133 U. S. 529 (33:766); *Pittsburgh C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421 (30:1031); *Fairfield v. Gallatin County*, 100 U. S. 47 (25:544); *How. Mach. Co. v. Gage*, 100 U. S. 676 (25:754); *Fleitas v. Cockrem*, 101 U. S. 301 (25:954); *Douglass v. Pike County*, 101 U. S. 677 (25:968); *Darlington v. Jackson County*, 101 U. S. 688 (25:972); *Foote v. Pike County*, 101 U. S. 688 (25:972); *Weightman v. Clark*, 103 U. S. 256 (26:392); *Wade v. Walnut*, 105 U. S. 1 (26:1027); *Louisiana v. Pillsbury*, 105 U. S. 278 (26:1090); *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667 (26:1204); et passim.

³ *Pleasant Tp. v. Aetna L. Ins. Co.*, 138 U. S. 68 (34:864); *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101 (37:97); *Brooklyn City R. R. Co. v. Nat. Bank of Republic*, 102 U. S. 14 (26:61); *Watson v. Tarpley*, 18 How. 517 (15:

two systems of laws constitute the bases and sources of the law and jurisprudence administered in the federal courts; and in the following sections of this chapter and in the chapter next succeeding an effort will be made to give a general statement of the application of those laws in judicial controversies in the federal courts, and to point out the principles which must control in cases of conflict between state and federal laws.

§ 65. **Federal and state laws form one composite system of jurisprudence for the state.**—The laws of the United States are laws of the several states, and are just as much binding on the citizens and courts thereof as are the state laws. The United States, in their relation to the states, are not a foreign sovereignty, but are a concurrent sovereignty, and, within their constitutional sphere of action, are a paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state; concurrent as to place and persons, though distinct as to subject-matter. And although the two sovereignties are distinct, and each is supreme within its own sphere of action, and neither can interfere with the proper jurisdiction of the other, yet the system of laws of the United States and the system of laws of the state together form one composite system of laws and jurisprudence, which constitutes the law of the land for the state. The courts of the two sovereignties are not foreign to each other, nor are they to be treated by each other as such, but as courts of the same country, exercising jurisdiction partly different and partly concurrent. Legal or equitable rights, arising under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. A legal or equitable right arising under the state laws may be enforced in the state courts, and also, if there be diversity of citizenship, in the federal courts. And so, rights, whether legal or equitable, arising under the laws of the United States, may be enforced in the

509); *Mercer County v. Hackett*, 1 Wall. 83 (17:548); *Pine Grove v. Talcott*, 19 Wall. 666 (22:227); *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239 (25:580);

Neves v. Scott, 13 How. 268 (14:140); *Michigan Cent. R. R. Co. v. Myrick*, 107 U. S. 102 (27:325); *Puna v. Bowler*, 107 U. S. 529 (27:424).

federal courts, or in the state courts competent to hear and determine rights of like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, congress may, if it sees fit, give to the federal courts exclusive jurisdiction, either expressly or by implication.⁴

§ 66. The supreme law of the land.—Under the partitioned sovereignty, and the dual system of government established by the constitution, executing and administering two systems of laws within the same territory, although those two systems of laws together form one composite system of jurisprudence and constitute the law of the land for the state, it was, in order to insure domestic tranquility, absolutely essential that in all cases of conflict of authority, one of the governments should be superior to the other, and should be vested with the power and right of control; this exigency was foreseen by the founders of the government, and provided for in the federal constitution, and to which all the states assented, in the following provisions:

“This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges, in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

“The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.”⁵

An act of congress in conflict with the constitution is void; in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not laws of the United States generally, but those only which shall be made in pursuance of the constitution have that rank.⁶ The govern-

⁴ *Clafin v. Houseman*, 93 U. S. 130, 143 (23:833).

⁶ *Marbury v. Madison*, 1 Cranch, 137 (2:60).

⁵ U. S. Const. art. VI, cl. 2, 3.

ment of the United States, though limited in its powers, is supreme within its rightful sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.⁷

§ 67. **Same—Treaties; their nature—New principle introduced by the constitution.**—A treaty is in its nature, primarily, a contract between two or more independent nations, and not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. But in the United States a new and different principle has been introduced and established by the constitution, which places treaties constitutionally made on the same footing, and makes them of like obligation with an act of legislation, and declares them both to be the law of the land, giving neither any superior efficacy over the other; and, consequently, when a treaty is self-executing it is to be regarded by the courts of justice as equivalent to an act of congress. When a treaty and an act of congress relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject under judicial investigation is self-executing.⁸

§ 68. **The United States government is vested with power to execute the federal laws on every foot of American soil.**—The government of the United States may, and it is its duty to, execute, by its own agencies, its laws, and exercise its powers and functions on every foot of American soil; and this it may do in a proper case by means of physical force, or by means of the regularly established judicial procedure in its own judicial tribunals, as the exigency of the case may require.⁹ No

⁷ *McCulloch v. Maryland*, 4 Wheat. 316 (4:60).

⁸ *Foster v. Neilson*, 2 Pet. 253 (7:415); *Whitney v. Robertson*, 124 U. S. 190 (31:386); *Edge v. Robertson*, 112 U. S. 580 (28:798); *Botiller v. Dominguez*, 130 U. S. 238, 256 (32:926).

⁹ *Re Debs*, 158 U. S. 564, 600 (39:1092); *McCulloch v. Maryland*, 4 Wheat. 316, 405 (4:576, 605); *Ex parte Seibold*, 100 U. S. 371, 395 (25:715); *Cohens v. Virginia*, 6 Wheat. 264, 413 (5:257, 293); *U. S. v. Tarble*, 13 Wall. 397 (20:597); *Ableman v. Booth*, 21 How. 506 (16:169).

trace is to be found in the constitution of an intention to create a dependence of the general government on the governments of the states for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone it was expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.¹⁰ While under the dual system which prevails in the United States, the powers of government are distributed between the states and the United States government, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state.¹¹

§ 69. Power of federal judiciary to declare state law void.—The constitution and laws of a state, when repugnant to the federal constitution, or to any valid law or treaty of the United States, are absolutely null and void;¹² and the supreme court of the United States is, by the federal constitution, vested with appellate jurisdiction over the highest courts of the states in all cases arising under the constitution, laws and treaties of the United States, and, in the exercise of that appellate jurisdiction, it has the power and authority to declare void any law of a state or any provision of a state constitution, if found to be repugnant to the constitution or any valid law or treaty of the United States, and that appellate jurisdiction may be so exercised although a state be a party to the suit.¹³ It is a

¹⁰ *McCulloch v. Maryland*, 4 Wheat. 316, 405 (4:576, 605).

¹¹ *Re Debs*, 158 U. S. 564, 600 (39:1092).

¹² U. S. Const. art. VI; *Cohens v. Virginia*, 6 Wheat. 264, 448 (5:257); *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Gibbons v. Ogden*, 9 Wheat. 1, 239 (6:23).

¹³ U. S. Const. art. III, sec. 2;

original judiciary act, sec. 25, 1 U. S. stat. at L. ch. 20, pp. 73, 79; U. S. Rev. Stat. sec. 709; *Cohens v. Virginia*, 6 Wheat. 264, 448 (5:257); *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Gibbons v. Ogden*, 9 Wheat. 1, 239 (6:23); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328 (4:97).

political axiom, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.¹⁴ And it was the great object of the federal constitution to establish three great departments of government, the legislative, the executive and the judicial; the first was to pass laws, the second was to approve and execute them, and the third was to expound and enforce them; and without the judicial department, it would be impossible to carry into effect the powers of the government.¹⁵ The basic principle upon which the power of the federal judiciary rests is the great principle which pervades the constitution, namely: that the constitution and valid laws and treaties of the United States are supreme, and that they control the constitution and laws of the respective states, and cannot be controlled by them.¹⁶

¹⁴ *Cohens v. Virginia*, 6 Wheat. 264, 448 (5:257); *Osborn v. Bank*, 9 Wheat. 738-903 (6:204).

¹⁵ *Martin v. Hunters Lessee*, 1 Wheat. 304, 328 (4:97).

¹⁶ *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579).

CHAPTER IV.

THE ADMINISTRATION OF STATE LAWS BY THE FEDERAL JUDICIARY.

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| <p>§ 70. The great body of municipal law derived from state authority.</p> <p>71. Legislative recognition of state laws by act of congress.</p> <p>72. The construction of the thirty-fourth section of the judiciary act not uniform.</p> <p>73. Independent and co-ordinate jurisdiction of the federal courts in the administration of state laws.</p> <p>74. Only the strictly local laws of the state are binding on the federal courts.</p> <p>75. When United States supreme court follows state decisions construing state constitutions and statutes—General rule.</p> <p>76. Construction of state constitutions and statutes when federal question involved—Impairing obligation of contracts.</p> <p>77. State decisions on enactment of state laws and their harmony with state constitution.</p> <p>78. Construction of state statutes providing for the levy and collection of taxes.</p> | <p>§ 79. State decisions not allowed to impair the obligation of contracts.</p> <p>80. State decisions establishing rules of property.</p> <p>81. Statutes of limitations.</p> <p>82. Statutes of frauds.</p> <p>83. Same—Fraudulent conveyances.</p> <p>84. Recording acts of the states.</p> <p>85. Decisions as to whether a corporation has been created.</p> <p>86. Principles of general law—Responsibility of railroad company to employe.</p> <p>87. General commercial law.</p> <p>88. Same—Insurance policies.</p> <p>89. When private rights determined by common law.</p> <p>90. Constitutionality of state statute authorizing issue of bonds in aid of railway construction.</p> <p>91. When federal courts will change their decisions to conform to state decisions.</p> <p>92. When federal courts will not change their decisions to conform to state decisions.</p> <p>93. Federal administration of state laws in cases where a federal question is involved.</p> |
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§ 70. The great body of municipal law derived from state authority.—As will fully and clearly appear from the authorities cited in the chapter next preceding, it is an axiom in the

American system of law and government that the constitution, laws, and treaties of the United States are the supreme law of the land, and the main purpose had in view by the founders of the government in giving to the United States supreme court appellate jurisdiction over the highest courts of the state in all cases involving a federal question was to preserve that supremacy and to declare void all state laws found to be in conflict therewith;¹ and in all cases carried to the United States supreme court under the twenty-fifth section of the judiciary act,² that court must determine for itself the construction and effect of any statute of a state brought under review, without reference to the previous adjudications of the highest court of the state upon the subject,³ and the same principle is applied in cases involving a federal question carried by writ of error or appeal from the circuit courts of the United States to the supreme court.⁴ Notwithstanding the limitations and restrictions imposed by the federal constitution upon the sovereignty of the states, yet, nevertheless, the government of the United States is a government of enumerated powers, restricted to certain specified purposes of government, national in their character, and the field of state legislation is very broad and comprehensive, and the ramifications of state powers touch and press upon the commonwealth at every vital point and regulate, to some extent, every important interest of the local community, and the great body of the municipal law of the states is derived from the authority of the states, respectively; and in a large class of cases the federal courts have concurrent jurisdiction with the courts of the states in the administration of purely local or state laws, and also those general principles of law and jurisprudence which constitute a part of the system of jurisprudence of all the states.⁵ It is the purpose of this chapter to point out some of the subjects of legislation reserved

¹ *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23).

² U. S. Rev. Stat. sec. 709.

³ *U. S. v. Muscatine*, 8 Wall. 575, 587 (19:490); *Bank v. Kelly*, 1 Black, 436 (17:173); *Hall v. De Cuir*, 95 U. S. 485 (24:547).

⁴ *Railroad Co. v. Otoe County*, 16 Wall. 667 (21:375); *Olcott v. Su-*

pervisors, 16 Wall. 678 (21:382); *Pine Grove Township v. Talcott*, 19 Wall. 666, 679 (22:227).

⁵ U. S. Rev. Stat. sec. 721; *Reynolds v. Crawfordville Bank*, 112 U. S. 405 (28:733); *Ex parte McNeil*, 13 Wall. 236 (20:624); *The Orleans v. Phœbus*, 11 Pet. 175 (9:677); *Fitch v. Creighton*, 24 How. 159 (16:596); *Beauregard v.*

to the states, and some of the instances in which state laws are administered by the federal courts, and in the administration of which they follow the construction given them by the highest courts of the state.

§ 71. **Legislative recognition of state laws by act of congress.**—By the thirty-fourth section of the original judiciary act, it was enacted that: “The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”⁶ This section of the statute was a recognition of the *lex loci*; it was intended to give a rule of decision, and has no application to the practice of the courts.⁷

§ 72. **Construction of the thirty-fourth section of the judiciary act not uniform.**—The section of the judiciary act above quoted, has often been the subject of construction in the supreme court of the United States; and the opinions of that court upon the subject have not always been expressed in language that is entirely harmonious; and what are the laws of the several states which are to be “regarded as rules of decision in trials at common law in the courts of the United States” have not been ascertained and defined, with precision and uniformity. The language of the section limits its application to trials at common law, and there is in the section nothing which requires its application to suits in equity or admiralty; nor is it applicable to criminal offense against the United States, nor where the constitution, treaties or statutes of the United States require other rules of decision. And while it has often been declared that the courts of the United States adopt and follow the decisions of the state courts in questions which concern merely the constitution and laws of the state, yet there are undoubtedly many exceptions to the rule.⁸

New Orleans, 18 How. 497 (15:469); Christy v. Pridgeon, 4 Wall. 196 (18:322); Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270 (20:571); Hinde v. Vattier, 5 Pet. 398 (8:168); Butz v. Muscatine, 8 Wall. 575 (19:490); Shelby v. Guy, 11 Wheat. 361 (6:495);

League v. Egery, 24 How. 264 (16:655); McKeen v. Delancy, 5 Cranch, 22 (3:25); Williamson v. Suydam, 6 Wall. 723 (18:967).

⁶ U. S. Rev. Stat. sec. 721.

⁷ Wyman v. Southard, 10 Wheat. 1 (6:253).

⁸ Bucher v. Cheshire R. Co., 125

§ 73. **Independent and co-ordinate jurisdiction of the federal courts in the administration of state laws.**—The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true in regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced in doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the federal courts jurisdiction to administer the laws of the states in controversies between citizens of different states, was to institute independent tribunals which it might be supposed

would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.⁹

§ 74. Only the strictly local laws of the state are binding on federal courts.—It was held at an early day and recently approved by the supreme court, that the true interpretation of the thirty-fourth section of the judiciary act limits its application to state laws strictly local, that is, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the right and title to real estate and other matters immovable and infraterritorial in their character, and that it has no application to general commercial law.¹⁰

§ 75. When United States supreme court follows state decisions construing state constitutions and statutes—General rule. Upon the construction of the constitution and laws of the state, the supreme court, as a general rule, follows the decisions of the highest courts of the state, unless they conflict with or impair the efficacy of some provision of the federal constitution, or of a federal statute, or a rule of general commercial law. And this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the state, and its laws and customs of a local character when established by repeated decision. Substantially conclusive effect is given to such decisions upon the construction of statutes, as affecting title to real estate within the state. And while the rule is thoroughly settled that remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state, yet an enlargement of equitable rights by state statute may be administered by the circuit courts of

U. S. 555, 558 (31:795), and authorities cited.

⁹ Burgess v. Selegman, 107 U. S. 20, 38 (27:359); Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 363 (37:772).

¹⁰ Swift v. Tyson, 16 Pet. 1, 24 (10:805); Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 411 (37:772).

the United States as well as by the courts of the state; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction.¹¹

§ 76. Construction of state constitutions and statutes when federal question involved—Impairing obligation of contract.—In cases involving the question whether the obligation of a contract alleged to have arisen from state legislation or by agreement with the agents of a state by its authority, has been impaired by a state law, a federal question is presented for determination, and, in such cases, the supreme court of the United States will, independently of the decisions of the highest court of the state, decide for itself (1) whether a contract was created by the state statute or other authority of the state, and (2) if there be a contract whether its obligation has been impaired; and, if the decision of these questions require a construction of the constitution and laws of the state, the court in construing them will act upon its own judgment and independently of the previous adjudications of the state court upon the same or similar questions.¹²

§ 77. State decisions on enactment of state laws and their harmony with state constitution.—Whether the statutes of a state have been duly enacted in accordance with the requirements of its constitution is not a federal question, and the decision of the highest court of a state as to what are the laws of the state,¹³ or that the procedure prescribed by the state constitution to be observed by its legislature in the enactment of laws is mandatory and that enactments passed in violation

¹¹ Gormley v. Clark, 134 U. S. 338, 350 (33:909).

¹² Louisville & Nashville Railroad Co. v. Palmes, 109 U. S. 244, 258 (27:922); Louisville Gas Co. v. Citizens Gas Light Co., 115 U. S. 633, 700 (29:510); Citizens Savings Bank v. Owensboro, 173 U. S. 636, 662 (43:840); McCulloch v. Virginia, 172 U. S. 102, 133 (43:382); Bank v. Skelley, 1 Black, 436, 443 (17:173); McGahey v. Virginia, 135 U. S. 665 (34:305);

Douglas v. Kentucky, 168 U. S. 488, (42:553); Wright v. Nagles, 101 U. S. 791, 797 (25:92); Stearns v. Minnesota, 179 U. S. 223, 262 (45:162).

¹³ Leeper v. Texas, 139 U. S. 462, 468 (35:225); Railroad Co. v. Georgia, 98 U. S. 359 (25:185); Leavenworth County, v. Barnes, 94 U. S. 70 (24:63); South Ottawa v. Perkins, 94 U. S. 260 (24:154); Bank v. Ottawa, 105 U. S. 667 (26:1204).

thereof are void,¹⁴ or that a statute of the state is in harmony with the state constitution,¹⁵ or that a statute imposing a license tax on commerce does not apply to interstate commerce,¹⁶ or that the procedure by which a state officer has been removed from office was in accordance with the constitution and laws of the state,¹⁷ or construing the statute of limitations of a state,¹⁸ will be followed by the United States supreme court.

§ 78. Construction of state statutes providing for the levy and collection of taxes.—It is the peculiar province of the highest court of a state to decide whether or not the method pursued in the assessment, levy and collection of taxes is in conformity with the statutes of the state upon the subject, to construe such statutes, and determine whether or not they are in conformity with the state constitution; and such decision, no federal question being involved, will be followed by the supreme court of the United States.¹⁹

§ 79. State decisions not allowed to impair the obligation of contracts.—The construction given by the highest tribunal of a state to its statute or a provision of its constitution must be taken as correct as to all contracts made under the statute, or constitutional provisions so construed, and the validity and obligation of such contracts cannot be impaired by any subsequent decision altering the construction; the construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two states, expressed in the same terms, is construed differently by their highest courts, they are treated by the United States supreme court as different laws, each embodying the particular construction of its own state and enforced in accordance with it

¹⁴ Wilkes County Comrs. v. Coler, 180 U. S. 506, 533 (45:642).

¹⁵ Railroad Co. v. Backus, 154 U. S. 424 (38:1031); County of Lincoln v. Luning, 133 U. S. 529 (33:766); Brown v. New Jersey, 175 U. S. 172, 177 (44:119).

¹⁶ Osborn v. Florida, 164 U. S. 650, 656 (41:586).

¹⁷ Wilson v. North Carolina, 169 U. S. 586, 600 (42:865).

¹⁸ Dibble v. Bellingham Bay Land Co., 163 U. S. 63 (41:72).

¹⁹ Taylor v. Secor, 92 U. S. 575 (23:663); Balley v. Maguire, 22 Wall. 215 (22:850); Palmer v. McMahon, 133 U. S. 660, 670 (33:772); Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18 (35:613); Provident Sav. Inst. v. Mass., 6 Wall. 611, 632 (18:907); Gilman v. Sheboygan, 2 Black, 510, 518 (17:305).

in all cases arising under it. The statute as thus expounded determines the validity of all contracts made under it, and a subsequent change in its interpretation can affect only subsequent contracts. The true rule upon this subject, as established by a long line of decisions of the supreme court of the United States, "is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by legislative enactment." It is not only the right but the duty of the highest court of a state to change its opinions, whenever in its judgment the necessity arises, and such change may be made for new reasons or because of a change of opinion in respect to old ones; but the supreme court of the United States will not follow a state court in its change of opinion when it affects rights vested before the change was made.²⁰

§ 80. **State decisions establishing rules of property.**—When the decisions of the highest court of a state, whether founded on statute or not, have become rules of property within the state, such decisions are binding on the federal courts of law and equity in adjudicating upon titles in that state.²¹ The ti-

²⁰ *Louisiana v. Pilsbury*, 105 U. S. 278, 302 (26:1090); *Douglass v. Pike County*, 101 U. S. 686 (25:971); *Christy v. Pridgeon*, 4 Wall. 197 (18:322); *Gelpcke v. Dubuque*, 1 Wall. 75 (17:520); *Thompson v. Lee County*, 3 Wall. 327 (18:177); *Lee County v. Rogers*, 7 Wall. 181 (19:160); *Chicago v. Sheldon*, 9 Wall. 50 (19:594); *Olcott v. Supervisors*, 16 Wall. 678 (21:382); *Fairfield v. Gallatin County*, 100 U. S. 47 (25:544); *Rowan v. Runnels*, 5 How. 134; *Ohio Ins. & Tr. Co. v. Debolt*, 16 How. 416; *Loeb v. Trustees of*

Columbia Township, 179 U. S. 472, 494 (45:280), and authorities cited. This is not in conflict with *B. & L. Asso. v. Brahan*, 193 U. S. 635-651 (48:823).

²¹ *Gormley v. Clark*, 134 U. S. 338, 350 (33:909); *Polk v. Wendal*, 9 Cranch, 87 (3:665); *Shelby v. Guy*, 11 Wheat. 361 (6:495); *Green v. Neal*, 6 Pet. 291 (8:495); *Webster v. Cooper*, 14 How. 488 (14:510); *League v. Egery*, 24 How. 264 (16:655); *Russell v. Ely*, 2 Black, 575 (17:258); *Liffingwell v. Warren*, 2 Black, 599 (17:261); *Woods v. Freeman*, 1 Wall. 398

tle to real estate, and the construction of deeds and statutes in respect thereto are matters of local law and rules of property and bind the federal courts of law and equity.²²

§ 81. **Statutes of limitations.**—No laws of the several states have been more steadfastly or more often recognized by the supreme court of the union, from the beginning, as rules of decisions in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state and as construed by its highest court; and the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitations of the several states as rules of decision under the thirty-fourth section of the Judiciary Act, and give them the same construction and effect which are given by the state courts.²³ Laws limiting the time for bringing suits constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important sovereign rights.²⁴

§ 82. **Statute of frauds.**—The statute of frauds, even as applied to commercial instruments, is such a law of the state as

(17:543); *Walker v. Marks*, 17 Wall. 648 (21:744); *McKeen v. Delancy*, 5 Cranch, 22 (3:25); *Williamson v. Suydam*, 6 Wall. 723 (18:967); *Bondurant v. Watson*, 103 U. S. 281 (26:447).

²² *Halstead v. Butler*, 140 U. S. 273, 278 (35:484); *Ridings v. Johnson*, 128 U. S. 212 (32:401); *Byers v. McAuley*, 149 U. S. 608 (37:867); *St. Louis v. Rutz*, 138 U. S. 226 (34:964); *Cross v. Allen*, 141 U. S. 528 (35:843); *Van Rensseler v. Kearney*, 11 How. 297 (13:703); *Warburton v. White*, 176 U. S. 484 (44:555); *Bardon v. Land & R. Imp. Co.*, 157 U. S. 327 (39:719); *Williams v. Gaylord*, 186 U. S. 157 (46:1102); *Middleton v. McCrew*, 23 How. 45 (16:403); *Blanchard v. Brown*, 3 Wall. 245 (18:69); *Gage v. Pum-*

pelly, 115 U. S. 454 (29:449); *Lippincott v. Mitchell*, 94 U. S. 767 (24:315); *Ross v. M'Lung*, 6 Pet. 283 (8:400); *Henderson v. Griffin*, 5 Pet. 151 (8:79); *Beauregard v. New Orleans*, 18 How. 497 (15:469); *St. John v. Chew*, 12 Wheat. 153 (6:583); *Thatcher v. Powell*, 6 Wheat. 119 (5:221); *Hinde v. Valtier*, 5 Pet. 398 (8:168); *Ward v. Chamberlain*, 2 Black, 430 (17:319); *Clements v. Berry*, 11 How. 398 (13:745).

²³ *Bauserman v. Blount*, 147 U. S. 647, 661 (37:316), collecting and citing the authorities on the subject; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 190 (38:957), collecting and citing authorities.

²⁴ *Amy v. Dubuque*, 98 U. S. 470, 471 (25:228).

has been declared by congress to be a rule of decision in the courts of the United States.²⁵

§ 83. **Same—Fraudulent conveyance.**—The statute of Elizabeth against fraudulent conveyances, has been universally adopted in American law as the basis of our jurisprudence on that subject, and re-enacted in terms, or nearly so, or with some change of language, by the legislatures of the several states. In controversies arising under this statute, involving, as they do, the rights of creditors locally, and a rule of property, the supreme court of the United States accepts the conclusions of the highest judicial tribunal of the state as controlling.²⁶

§ 84. **Recording acts of the states.**—The supreme court of the United States is bound to follow the decisions of the courts of the states in the construction of their recording acts, if there has been a uniform course of decisions respecting them.²⁷

§ 85. **Decision as to whether a corporation has been created.**—The decision of the highest court of a state, that a certain association has been duly created a corporation according to its constitution and laws is binding on the United States supreme court.²⁸ And a construction placed by the highest court of a state on a statute enacted by its legislature chartering or incorporating a company, as to the powers of such corporation, is conclusive on the United States supreme court.²⁹ The decision of the supreme court of Pennsylvania that the Erie Railway Company was doing business in that state in the sense of a statute of the state on that subject was accepted as conclusive by the supreme court of the United States.³⁰

§ 86. **Principles of general law—Responsibility of railroad company to employe.**—The unvarying rule is that in cases or questions whose decisions depend upon general principles of law, the supreme court of the United States, while leaning

²⁵ *Moses v. Bank*, 149 U. S. 298 (37:743).

²⁶ *Peters v. Bain*, 133 U. S. 670, 697 (33:696); *Jaffray v. McGhee*, 107 U. S. 361, 364 (27:495); *Lloyd v. Fulton*, 91 U. S. 479, 485 (23:369); *Allen v. Massey*, 17 Wall. 351 (21:542).

²⁷ *Townsend v. Todd*, 91 U. S.

452, 454 (23:413); *Bank v. Sprague*, 17 Fed. R. 788.

²⁸ *Nesmith v. Sheldon*, 7 How. 812 (12:925).

²⁹ *Smith v. Kernochen*, 7 How. 198 (12:666).

³⁰ *Erie Railway Co. v. Pennsylvania*, 21 Wall. 492, 500 (22:595).

toward the views of the highest court of the state where the cause of action may arise, will always exercise an independent judgment, and will determine the question involved by a reference to all the authorities applicable to it, and a consideration of the principles underlying it; and it is the settled doctrine of the federal courts that the responsibility of a railroad company to its employes, and its liability to them for personal injuries received by the negligence of its servants, and who are, and who are not fellow-servants, are, in the absence of controlling local statutes, matters of general law in regard to which the federal courts will exercise an independent judgment.³¹

§ 87. General commercial law.—While the federal courts must regard the laws, and their construction by the state courts (except when the constitution, treaties or statutes of the United States otherwise provide), as rules of decision in trials at common law, in cases where applicable, they are not bound by the decisions of the state courts upon questions of general commercial law; for such state decisions are not expositions of any local law, but a law existing throughout the union, except where it has been modified or changed by some local statute; it is a law not peculiar to one state, nor dependent upon local authority, but one arising out of the usages of the commercial world, and in the application of its principles the federal court will exercise an independent judgment.³²

³¹ *Baltimore & Ohio Railroad Company v. Baugh*, 149 U. S. 368, 411 (37:772); *Gardner v. Michigan Central R. Co.*, 150 U. S. 349, 361 (37:1107); *Pennsylvania Co. v. Fishack*, 59 C. C. A. 269.

In the case first above cited, Brewer, Justice, delivering the opinion of the court, said: "Again, according to the decisions of this court, it is not open to doubt that the responsibility of a railroad company to its employes is a matter of general law. * * * But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it

does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of the law."

³² *Swift v. Tyson*, 16 Pet. 1, 24 (10:865); *Oates v. First Nat.*

§ 88. **Same—Insurance policies.**—The construction of a policy of fire insurance is a matter of general commercial law, and is not regulated by any local policy or custom; and, while the decisions of the state tribunals on the subject are entitled to great respect, they cannot conclude the judgment of the federal courts in adjudicating upon the rights of parties to such contracts.³³ The construction of a policy of marine insurance depends on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment, and are not bound to accept the state decisions of the state where the contract was made.³⁴ But the interpretation of a state statute by the highest court of a state, holding that it applies to policies issued by foreign insurance companies, and annuls the provisions of such policies where they contravene the statute, is binding on the supreme court of the United States.³⁵

§ 89. **When private rights determined by common law.**—When private rights are to be determined by the application of common-law rules alone, the supreme court, although entertaining for state tribunals the highest respect, does not feel bound by their decision.³⁶

§ 90. **Constitutionality of state statute authorizing issue of bonds in aid of railway construction.**—The question whether or not a state statute enabling any township, city or village to issue bonds in aid of railroad construction, is in conflict with the constitution of the state, is a question of general jurisprudence, in regard to which the supreme court of the United

Bank, 100 U. S. 239, 250 (25:580); Brooklyn City and Newton R. Co. v. Nat. Bank, 102 U. S. 14, 59 (26:61); Carpenter v. Ins. Co., 16 Pet. 495; Watson v. Tarpley, 18 How. 517 (15:509). "The law respecting negotiable instruments may truly be declared in the language of Cicero, adopted by Lord Mansfield, to be in a great measure not the law of a single country only, but of the commercial world." Story, Justice, in Swift v. Tyson, *supra*.

³³ Carpenter v. The Providence

Washington Insurance Co., 16 Pet. 495, 512 (10:1044).

³⁴ Washburn & Marine Manufacturing Co. v. Reliance Marine Insurance Co., 179 U. S. 1, 19 (45:49).

³⁵ New York Life Insurance Co. v. Cravens, 178 U. S. 389, 401, (44:1116).

³⁶ Chicago v. Robbins, 2 Black, 418, 429 (17:298); Murray v. Railroad, 92 Fed. 871; Myrick v. Mich. Central R. R., 107 U. S. 109 (27:327).

States will exercise an independent judgment and will not be bound by the decisions of the highest court of the state where the transaction arose.³⁷ It is an axiom in American jurisprudence, that a state statute is not to be pronounced void upon the ground that it is in conflict with the constitution of the state, unless the repugnancy to the constitution be clear and the conclusion that it exists is inevitable; every doubt is to be resolved in support of the enactment; the particular clause of the constitution with which it is alleged to be in conflict must be specified, and the act must admit of no reasonable construction in harmony with it, before it can be declared void. If the question involve the validity of commercial securities in the hands of bona fide holders, and at the time the securities were issued there had been no authoritative intimation that the statute in question was invalid, then in such case the question as to the validity of the statute belongs to the domain of general jurisprudence, and the federal courts are not bound by the judgment of the courts of the state where the case arises, but must hear and determine for themselves.³⁸

§ 91. When federal courts will change their decisions to conform to state decisions.—The supreme court will change its decision construing a state constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the state had interpreted the constitution differently, and that interpretation has become a fixed rule of property within the state.³⁹ In determining what the laws of the several states are, which will be regarded as rules of decision, the supreme court is bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them; and if there be any inconsistency in them, the general rule is that the supreme court follows the latest settled adjudications in preference to their earlier ones.⁴⁰

³⁷ *Pine Grove Township v. Talcott*, 19 Wall. 666, 679 (22:227); *Olcott v. Supervisors of Fond du Lac County*, 16 Wall. 678, 698 (21:382).

³⁸ *Pine Grove Township v. Talcott*, 19 Wall. 666, 679 (22:227); *Olcott v. Supervisors of Fond du Lac county*, 16 Wall. 678, 698 (21:382).

³⁹ *Fairfield v. Gallatin County*, 100 U. S. 47, 55 (25:544); *Ridings v. Johnson*, 128 U. S. 224 (32:405); *Green v. Neal*, 6 Pet. 291 (8:402); *Suydam v. Williamson*, 24 How. 427 (16:742).

⁴⁰ *Wade v. Travis County*, 174 U. S. 499, 510 (43:1060).

§ 92. **When federal courts will not change their decisions to conform to state decisions.**—When the highest court of a state has at different times placed different constructions upon the same statute of the state, the supreme court of the United States will not change its decision in order to conform to the state decision, if thereby contract rights which have accrued under the earlier decisions will be injuriously affected.⁴¹ And when the United States supreme court has first decided a question arising under a state statute and has placed a construction on that statute, that court will not change its decision to conform to a subsequently rendered contrary decision of the state court where it would destroy vested rights which accrued under the former decision.⁴² When a circuit court of the United States has, before any state decision upon the question, decided a question of state law, construing a state statute, upholding as valid certain commercial securities, and after the decision in the circuit court, and pending a writ of error therefrom, the state court renders a contrary decision, the supreme court will not reverse the decision of the circuit court in order to conform to the state court's decision.⁴³ When a circuit court of the United States adjudicates a land title in accordance with the decisions of the state courts constituting rules of property, the supreme court will not reverse the decision of the circuit court because since that decision the state courts have reversed their former decisions on the subject.⁴⁴

§ 93. **Federal administration of state laws in cases where a federal question is involved.**—The constitution and valid laws and treaties of the United States are the supreme law of the

⁴¹ *Douglass v. Pike County*, 101 U. S. 677, 688 (25:968); *Anderson v. Santa Anna*, 116 U. S. 356 (29:633); *Ralls County v. Douglass*, 105 U. S. 733 (26:1220); *New Buffalo v. Cambria Iron Works Co.*, 105 U. S. 73 (26:1024); *Foote v. Pike County*, 101 U. S. 688 (25:972); *Louisiana v. Pillsbury*, 105 U. S. 278 (26:1090); *Weightman v. Clark*, 103 U. S. 256 (26:392); *Darlington v. Jackson*, 101 U. S. 688 (25:972); *Thompson v. Lee County*, 3 Wall. 327 (18:177); *Kenosha v. Lamson*, 9 Wall. 477 (19:725); *Lee County v. United States*, 7 Wall. 181 (19:160); *Gelpcke v. Dubuque*, 1 Wall. 175 (17:520); *Olcott v. Fond du Lac County*, 16 Wall. 678 (21:382).

⁴² *Pease v. Peck*, 18 How. 595 (15:518); *Black v. Bourbon County*, 99 U. S. 686 (25:491).

⁴³ *Carroll County v. Smith*, 111 U. S. 556 (28:517); *Burgess v. Selegman*, 107 U. S. 20 (27:359); *Town of Roberts v. Bolles*, 101 U. S. 119 (25:880).

⁴⁴ *Morgan v. Curtenius*, 20 How. 1, 3 (15:823).

land, and all state laws, whether in the form of constitutional provisions or statutes or judicial decisions, in conflict therewith, are utterly null and void; and, in all cases carried from the highest court of a state under the twenty-fifth section of the Judiciary Act, or by writ of error or appeal from the United States circuit courts, to the supreme court of the United States, involving any such conflict or any federal question, that court will exercise an independent judgment in determining the question involved, whether it be the construction of a state statute, or the provisions of a state constitution, or a conflict between a state statute and a provision of the state constitution, or the validity of a rule laid down by the decisions of the highest court of the state; and will, in such cases, declare void all state statutes and constitutional provisions, and overturn all state decisions, found to be repugnant to or in conflict with the constitution or any treaty or statute of, or any commission held or authority exercised under the United States.⁴⁵

⁴⁵ U. S. Rev. Stat. sec. 709; *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *U. S. v. Muscatine*, 8 Wall. 575, 587 (19:490); *Bank v. Kelly*, 1 Black, 436 (17:173); *Hall v. De Cuir*, 95 U. S. 485 (24:547); *Railroad Co. v. Otoe County*, 16 Wall. 667 (21:375); *Olcott v. Supervisors*, 16 Wall. 679 (21:382); *Pine Grove Township v. Talcott*, 19 Wall. 666, 679 (22:227); *Louisville & Nashville Railroad Co. v. Palmes*, 109 U. S. 244, 258 (27:922); *Louisville Gas Co. v. Citizens Gas Light Co.*, 115 U. S. 633, 700 (29:510); *Citizens Savings Bank v. Owensboro*, 173 U. S. 636, 662 (43:840); *McCulloch v. Virginia*, 172 U. S. 102, 133 (43:382); *McGahey v. Virginia*, 135 U. S. 665 (34:305); *Douglas v. Kentucky*, 168 U. S. 488 (42:553); *Wright v. Nagle*, 101 U. S. 791, 797 (25:92); *Stearns v. Minne-*

sota, 179 U. S. 223, 262 (45:162); *Louisiana v. Pilsbury*, 105 U. S. 279, 302 (26:1090); *Douglass v. Pike County*, 101 U. S. 686 (25:971); *Christy v. Pridgeon*, 4 Wall. 197 (18:322); *Gelpcke v. Dubuque*, 1 Wall. 75 (17:520); *Thompson v. Lee County*, 3 Wall. 327 (18:177); *Lee County v. Rogers*, 7 Wall. 181 (19:160); *Chicago v. Sheldon*, 9 Wall. 50 (19:574); *Fairfield v. Gallatin County*, 100 U. S. 47 (25:544); *Rowan v. Runnels*, 5 How. 134; *Ohio Ins. & Tr. Co. v. Debolt*, 16 How. 416; *Loeb v. Trustees of Columbia Township*, 179 U. S. 472, 494 (45:280); *Martin v. Hunters Lessee*, 1 Wheat. 304, 328 (4:97); *Cohens v. Virginia*, 6 Wheat. 264, 448 (5:257); *Re Debs*, 158 U. S. 564, 600 (39:1092); *Ex parte Seibold*, 100 U. S. 371, 395 (25:715); U. S. Const. Art. VI.

CHAPTER V.

CONSTITUTIONAL LIMITATIONS IMPOSED UPON THE FEDERAL GOVERNMENT AFFECTING JUDICIAL PROCEDURE.

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§ 94. Great and important limitations imposed by the constitution upon the federal judiciary.—The federal constitution, in its original provisions, and more especially, in the earlier amendments, imposes great and important limitations and restrictions upon the federal government, as to the means and methods of procedure to be adopted and pursued in the execution of the powers vested in it by that instrument. These re-

straints and limitations embody great principles of human right, which, for centuries prior to the revolution, had been claimed and insisted upon by the English people, and the colonies in this country, as fundamental principles of the British constitution and the English common law, but which, in the long-continued struggle between the liberties of the people and the prerogatives of the crown, had been constantly invaded and violated; the invasion of those principles was one of the chief causes which resulted in the revolution and the formation of the union, and the founders of our government, led by the light of history, imposed these limitations upon that government, as a perpetual guaranty of the individual right of life, liberty and property. While these restraints operate uniformly upon all of the departments of the government, they are first observed as a check upon congress in legislation affecting the rights of persons, and more especially in the establishment of judicial procedure; but their operation is more constantly and familiarly manifested in the federal judicial tribunals, as they sit in the public administration of justice, adjudicating causes which involve the rights sought to be protected. These constitutional limitations literally abide upon and restrain the federal courts at every step taken throughout the progress of every judicial proceeding had or taken before them, in both civil and criminal cases, whether it be in the organization of the tribunal itself, the pleadings, the evidence, the conduct of the cause, the charge to the jury, the judgment and its execution, or appellate proceedings for its revision; and this being true, there can be no comprehensive understanding of the judicial procedure in the courts of the United States without taking into the account these constitutional provisions affecting it. It is designed in this chapter to discuss the constitutional limitations which regulate and control judicial procedure in the federal system, and to state some of the results reached by the adjudicated cases, and also to call attention to some of the rules of constitutional construction.

§ 95. The federal constitution must be construed in the light of the history and principles of the common law of England.—The constitution of the United States was written, and its provisions framed, in the language of the English common law, and many of its guaranties of life, liberty and property are

confirmatory of the principles of the common law, and are to be read and interpreted in the light of its history and principles, which were familiarly known to the founders of the government, and without reference to which that instrument could not be understood. The judicial ideas and legal definitions of American institutions are derived from the common law; and the code of constitutional and statutory construction which has been gradually formed by the judgments of the supreme court, in the application of the constitution and the laws and the treaties made in pursuance thereof has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.¹

§ 96. **The federal constitution construed in the light of contemporaneous history.**—It is a rule of constitutional construction, supported by the soundest reasoning and the universal experience of mankind, that its provisions should be examined and applied by the aid and in the light of contemporaneous history. The constitution, itself, shows that the framers of that instrument examined the state of things as they existed at the time, and the courts in construing it must, by recurring to the history of the times, make a like examination of the state of things existing when it was framed and adopted, in order to ascertain the old law, and the then existing evils and mischief, and the remedy intended to be provided for them.²

§ 97. **Same—Contemporaneous exposition.**—A contemporaneous exposition and construction of the federal constitution, placed upon it by the discussions in the *Federalist*, and by the legislation of congress, by men who were contemporary with the formation of that instrument, and were members of the convention that framed it, are of themselves entitled to great weight, and, when long practiced and acquiesced in, are conclusive.³

¹ *Moore v. United States*, 91 U. S. 270, 274 (23:346, 347); *United States v. Wong King Ark*, 169 U. S. 649 (42:890, 893); *Smith v. Alabama*, 124 U. S. 465, 483 (31:508, 514); 1 *Kent. Com.* 336; *Minor v. Happersett*, 21 Wall. 162-178 (22:627); *Boyd v. United States* 116 U. S. 616-641 (29:746); *Ex*

parte Wilson, 114 U. S. 417-429 (29:89); *South Carolina v. United States*, 199 U. S. 437-472 (50:261).

² *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233); *Cohens v. Virginia*, 6 Wheat. 416 (5:294).

³ *Pollock v. Bridgeport Steam-*

§ 98. **Construction of constitutional amendments.**—In construing a constitutional amendment, the safe rule is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. But this rule of construction could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.⁴

§ 99. **The first ten amendments are limitations on the federal government.**—The first ten amendments to the federal constitution contain no restrictions on the powers of the states, but were intended to operate solely and exclusively on the federal government. In order to limit the powers which it was feared might be claimed or exercised by the federal government, under the provisions of the constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several states by the first congress on September 25th, 1789. They were intended as restraints and limitations on the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective states.⁵

boat Co., 114 U. S. 411, 417 (29:147); Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (28:349); Cooley v. Philadelphia Port Wardens, 12 How. 299 (13:996); Cohens v. Virginia, 6 Wheat. 264 (5:257); Martin v. Hunter, 1 Wheat. 304 (4:97); Stuart v. Laird, 1 Cranch, 299 (2:115).

⁴ Maxwell v. Dow, 176 U. S. 581, 617 (44:597).

⁵ Brown v. New Jersey, 175 U. S. 172, 177 (44:119, 122); Maxwell v. Dow, 176 U. S. 581, 617 (44:597, 611); Barron v. Baltimore, 7 Pet. 243 (8:672); Fox v. Ohio, 5 How. 410 (12:231); Twitchell v. Pennsylvania, 7 Wall. 321

(19:223); United States v. Cruikshank, 92 U. S. 542, 552 (23:588, 591); Spies v. Illinois, 123 U. S. 131 (31:80); Re Sawyer, 124 U. S. 200 (31:402, 408); Eilenbecker v. Plymouth County Dist. Ct., 134 U. S. 31 (33:801); Davis v. Texas, 139 U. S. 651 (35:30); McElvaine v. Brush, 142 U. S. 155 (35:971); Thorrington v. Montgomery, 147 U. S. 490 (37:252); Miller v. Texas, 153 U. S. 535 (38:402); Holden v. Hardy, 169 U. S. 366 (42:787); Walker v. Sauvinet, 92 U. S. 90 (23:678); Edwards v. Elliott, 21 Wall. 532 (22:487); Pearson v. Yewdall, 95 U. S. 294 (24:436).

§ 100. Same—Effect of the fourteenth amendment.—The adoption of the fourteenth amendment to the constitution has not enlarged the operation of the first ten amendments; it has not had the effect to make the former amendments operate as restraints and limitations upon the state governments; nor has it had the effect of making all or any of the provisions of the first ten amendments, so far as they secure the fundamental rights of individuals against the exercise of federal power, immunities of a citizen of the United States; nor does it take from the states full control over the procedure in their own courts, in either civil or criminal cases, further than to require that such procedure must not work a denial of the fundamental rights, nor conflict with specific and applicable provisions of the federal constitution.⁶

§ 101. Treason defined, the quantity of evidence requisite for conviction prescribed, and the penalty limited by, the constitution.—The constitution declares that: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The congress shall have power to declare the punishment for treason; but no attainder of treason shall work corruption of blood, except during the life of the person attainted."⁷ This definition of treason reduces the constituent elements of the crime to two ultimate facts, either one of which, when established by the quantity of evidence prescribed, makes out the offense. The vague and indefinite terms of the British statute on the subject, and the doctrine of "constructive treason," the great number of acts held by the English judges to constitute it, the admission of hearsay evidence, the denial to the accused of counsel and compulsory process for witnesses, had placed in the hands of the crown the most powerful engine of oppression against the people in their struggle for freedom known in English history,⁸ and it

⁶ *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597, 611); *Brown v. New Jersey*, 175 U. S. 172, 177 (44:119, 122).

⁷ U. S. Const., Art. III, sec. 3.

⁸ *Hallam's Const. Hist. Eng.* 102, 138, 198, 574, 575, 578, 579; IV *Blackst. Com.* 75-85; *State Tr.* I, 965; *State Tr.* IV, 1329; *State Tr.* VI, 153; *State Tr.* IX, 817, 861,

was no doubt one of the purposes of the framers of the constitution to prevent kindred evils in this country. And by the judicial procedure established by the legislative branch of the government, acting in obedience to the mandate of the constitution, no person shall be prosecuted, tried or punished for treason, unless the indictment is found within three years next after such treason is committed; and when any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same; and he shall be allowed to make his full defense by counsel learned in the law, and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours; and he shall be entitled to challenge peremptorily twenty jurors; and he shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at the trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.⁹

§ 102. Same—Statutory definition—Punishment of treason. The legislative department has declared that, “every person owing allegiance to the United States who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.”¹⁰ And the punishment of treason is declared as follows:

“Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so con-

862; State Tr. XI, 297, 322; State Tr. XX, 923.

⁹ U. S. Rev. Stat. secs. 819, 1033, 1034, 1043. !

¹⁰ U. S. Rev. Stat. sec. 5331.

victed of treason shall, moreover, be incapable of holding any office under the United States.”¹¹

§ 103. **Bills of attainder prohibited—Defined.**—Both the federal government¹² and the states¹³ are prohibited from passing bills of attainder, and the prohibition extends to and includes bills of pains and penalties.¹⁴ This species of legislative action is characterized by an English law writer as follows:

“Bills of attainder and bills of pains and penalties, are instances of the transcendent power of the legislature to punish offenses otherwise than according to pre-ordained law, by a discretionary severity in lieu of an invariable standard. This occasional rigor too, is usually substituted for the ancient rule, at a time when men’s minds are heated with contest, or disturbed with threatened dangers. They furnish an instance of the legislature quitting its proper province, and suspending the judicial functions; and that, in order to punish the transgressions of laws which they have neglected to propound. Or impeachments, the commons are accusers, and the peers are judges of the crime imputed. In punishing criminals by bill, the king, lords and commons are accusers and judges, charging, convicting and condemning *uno flatu*.”¹⁵ Discussing the political ethics of this extraordinary procedure in a review of the Earl of Strafford’s case, the great historian of the British constitution said:

“It is undoubtedly a very important problem in political ethics, whether great offenses against the commonwealth may not justly incur the penalty of death by a retrospective act of the legislature, which a tribunal restrained by law is not competent to inflict. Bills of attainder had been by no means uncommon in England, especially under Henry VIII., but generally when the crime charged might have been equally punished by law. They are less dangerous than to stretch the boundaries of a statute by arbitrary construction. Nor do they seem to differ at all in principal from those bills of pains

¹¹ U. S. Rev. Stat. sec. 5332.

¹² U. S. Const. Art. I, sec. 9, cl. 3; *Ex parte Garland*, 4 Wall. 333 (18:366); *Cummings v. Missouri*, 3 Wall. 277 (18:356).

¹³ U. S. Const. Art I, sec. 10.

¹⁴ *Ex parte Garland*, 4 Wall. 333 (18:366); *Cummings v. Missouri*, 3 Wall. 277 (18:356).

¹⁵ *Dwarris on Statutes* (2nd Ed. 1848), 254.

and penalties which, in times of comparative moderation and tranquility, have sometimes been thought necessary to visit some unforeseen and anomalous transgression beyond the reach of our penal code. There are many, indeed, whose system absolutely rejects all such retrospective punishment, either from the danger of giving too much scope to vindictive passion, or on some more abstract principle of justice. Those who may incline to admit that the moral competence of the sovereign power to secure itself by the punishment of a heinous offender, even without the previous warning of law, is not to be denied, except by reasoning which would shake the foundation of its right to inflict punishment in ordinary cases, will still be sensible of the mischief which any departure from stable rules, under the influence of the most public-spirited zeal, is likely to produce.”¹⁶ The penalty in cases of attainder of treason and felony was death, accompanied with forfeiture of land and goods and corruption of blood.¹⁷

§ 104. Same—Defined by United States supreme court.—A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proof produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. These bills are generally directed against individuals by name; but they may be directed against a whole class; they inflict punishment absolutely, or conditionally.¹⁸

§ 105. Limitations upon the power of the government in prosecutions by impeachment.—The provisions of the federal constitution upon the subject of impeachments, written, of course, in the light of the history of parliamentary impeach-

¹⁶ Hallam's Const. Hist. 298.

¹⁸ Cummings v. Missouri, 3 Wall.

¹⁷ Blackst. Com. II, 251; ib. III, 227 (18:356).
102, 351; ib. IV, 381, 385, 386, 387.

ments in England, while they contain a grant of a distinct substantive power to the government, which it would not otherwise have possessed, also clearly define and limit that power, both as to the class of crimes and offenders subject to prosecution by impeachment, and also as to the punishment that may be inflicted upon conviction.¹⁹ The English parliament, at the time of our Revolution, had been for centuries "the supreme court of the kingdom, not only for the making, but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commons, in the method of parliamentary impeachment;" and that court possessed the power to impose heavy fines and penalties, and to inflict capital punishment, and exercised that power with an unsparing hand.²⁰ Blackstone states that: "A commoner cannot, however, be impeached before the lords for any capital offense, but only for high misdemeanors; a peer may be impeached for any crime."²¹ But Hallam, after a careful examination of the precedents, states, in the language of a resolution of the commons, "that it is the undoubted right of the commons, in parliament assembled, to impeach before the lords in parliament any peer or commoner for treason, or any other crime or misdemeanor; and that the refusal of the lords to proceed in parliament upon such impeachment is a denial of justice, and a violation of the constitution of parliament." And he adds: "The inadvertent position, therefore, of Blackstone, that a commoner cannot be impeached for high treason, is not only difficult to be supported upon ancient authorities, but contrary to the latest determination of the supreme tribunal."²²

§ 106. Same—History and character of the procedure in England—The commons the grand inquest of the realm.—At an early period in the parliamentary history of England, the commons, as the grand inquest of the realm, took upon themselves the character of accusers before the lords, of persons charged with treason, or other high crimes and misdemeanors

¹⁹ U. S. Const. Art. I, sec. 2, cl. 5; Art. I, sec. 3, cl. 6; Art. I, sec. 3, cl. 7; Art. II, sec. 2, cl. 1; Art. II, sec. 4, cl. 1; Art. III, sec. 2, cl. 2.

²⁰ 4 Blackst. Com. IV, 259; Hal-

lam's Const. Hist. England, 329, 464-467, 469, 482, 602-608; Dwaris on Statutes, 247-254.

²¹ Blackst. Com. IV, 259, 260.

²² Hallam's Const. Hist. England, 482, 483.

against the state; and this act of the commons assuming the invidious office, and, as the representative of the people at large, standing forward as the prosecutors of the highest and most powerful offenders against the state, forms a remarkable feature in the criminal jurisprudence of England. The assertion of this principle, of the duty of the commons to carry up complaints to the lords of any grievous maladministration, did, undoubtedly, contribute much toward controlling and repressing those acts of injustice and oppression, which ministers of state in more despotic governments, protected by their great rank and overbearing power, often exercised against those who offended them, and was often the means of bringing to punishment those "great apostates of the commonwealth," who, by their actions or counsels, endeavored to subvert the fundamental laws of the country, and to introduce an arbitrary and tyrannical government. At the same time, while it was in earlier times absolutely necessary for the preservation of the liberties of the English people, and the safety of the English constitution, that the commons should possess the extraordinary power assumed by them of bringing great offenders to justice, it should have been, in the opinion of England's greatest statesmen, more sparingly exercised, and confined to matters not within the cognizance of the ordinary tribunals, such as breaches of high offices of trust, judicial corruption, and the counseling of pernicious and dishonorable measures.

The first parliamentary impeachments were during the reign of Edward III, and the usual course seems to have been to present a memorial to the king in parliament, stating the offenses most injurious to the public at the time, and praying that the delinquents, without naming them, might meet the punishment of the law. After the petition had received encouragement from the crown, the commons exhibited articles of impeachment, specifying the particular culprits, and followed up the prosecution through its several stages, till finally, on conviction, they demanded judgment. During the reign of Richard II, an incident occurred which caused parliamentary impeachments to fall into disuse for a time. The commons with one accord came before the king, prelates and lords, and accused the Earl of Suffolk, late chancellor of England, of several crimes; and the king, having become desirous of abrogat-

ing parliamentary impeachments, propounded to his judges the question, whether, since the king can at his pleasure remove any of his judges and officers, and justify or punish them for their offenses, the lords and commons can, without the will of the king, impeach them in parliament for any crime; and this question, the judges, with the basest prostitution of their judicial character, it is said, answered in the negative, and if any one should do so he is to be punished as a traitor. As a result of that opinion, impeachments lay still, "but only like a sword in the scabbard," after the accession of Henry IV, till twenty-eighth Henry VI, when the commons in the case of the Duke of Suffolk, proceeded irregularly, inasmuch as the articles of impeachment were directly addressed to the king, which gave him an opportunity and a reasonable pretext, of which he availed himself, to interfere in the judgment, and screen a favorite minister from punishment. Under the reign of the Tudors, the institution fell into disuse, from the preference given to bills of attainder and pains and penalties by those sovereigns, when they wished to turn the arm of parliament against an obnoxious subject. Under the Stuarts, the practice of impeachments was revived, though without frequent application. There seems no doubt, it is said, that the *witan* was the tribunal for the trial of all great delinquents, accused of the heaviest crimes; and under the Plantagenet dynasty, parliament was looked to as the great remedial court for the redress of all grievances, private and public, it being a maxim of the times that in the high court of parliament alone could a king of England learn when wrongs had been unpunished, and where rights had been delayed. The ordinary courts of law, if sufficiently intelligent, were not sufficiently bold and strong to redress the subject's injuries, when the powerful ministers or the great officers of the crown were parties, or where the nobles interfered. The accusation of the commons stood in the place of an indictment, and one of their members was directed to impeach the delinquents by oral accusation at the bar of the house of lords, in the name of the commons in parliament assembled, and of all the commons of the united kingdom, signifying that articles of impeachment against the accused would be exhibited in due time, and praying that he may be sequestered from his seat or committed. Upon trial

and conviction, the lords could not pronounce judgment until demanded by the commons, and that enabled them to spare the accused, even after he had been found guilty.²³

§ 107. **Same—Same—Objects and purposes of parliamentary Impeachments in England—Ministerial responsibility.**—The history of parliamentary impeachments in England seem to indicate that their main objects and purposes were: (1) To inflict upon “great and enormous offenders,” upon the “great apostates of the commonwealth,” whether lords or commons, the punishments which the law annexed to their crime against the state.²⁴ (2) To preserve the liberties of the people and the constitution and laws of England against the encroachments and delinquencies of the crown, the commons in such case holding the ministers of the crown responsible for its executive policy and measures. *Ministerial responsibility* for the administrative acts of the crown has long been an established principle of the English constitution; the nature of that constitution requires that such “acts should be issued out in his majesty’s name, but, for all that, he is not responsible for them;” according to the constitution of the kingdom, the ministers are accountable for all. Even in an impeachment for treason, “no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign. He is considered, in the modern theory of the constitution, answerable for the justice, the honesty, the utility of all measures emanating from the crown, as well as for their legality; and thus the executive administration is rendered subordinate, in all great matters of policy, to the superintendence and virtual control of the two houses of parliament.”²⁵ (3) Another object of parliamentary impeachments was to maintain the honesty and efficiency of the administration of public affairs, to punish unfaithful, corrupt and dishonest officers, ministers and judges, and to secure a faithful execution of the laws, and the impartial administration of justice.²⁶ It cannot be overlooked that impeachments were sometimes used for the purposes of

²³ Dwaris on Statutes (2nd Ed.), 248-254. lam’s Const. Hist. England, 205, 206.

²⁴ IV Blackst. Com. 257-261; Dwaris on Statutes, 248; Hal- ²⁵ Hallam’s Const. Hist. Eng- land, 463, 619, note.

²⁶ IV Blackst. Com. 257-261.

religious and political repression, an instance of which was the execution of Archbishop Laud. In his case, the judges having, upon a reference from the lords, given the opinion that the charges contained no legal treason, the commons changed their impeachment into an ordinance for his execution.

§ 108. **Same—Objects and purposes of impeachments under the federal constitution.**—It would seem from the language of the federal constitution that the objects and purposes of impeachments are, to maintain the efficiency and fidelity of the public service, and to prevent criminals from holding and enjoying any office of honor, trust, or profit under the United States. “Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.” And “the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors,” and in such cases the president cannot grant reprieves or pardons. Upon conviction, the senate cannot inflict upon the accused the punishment or penalty annexed to his crime by law, as in the English parliament; but the delinquent is, nevertheless, liable and subject to indictment, trial, judgment, and punishment, according to law in the ordinary courts of justice.²⁷ At the time of the adoption of the constitution, there was some division of sentiment among the statesmen of that day, as to the power of removal vested in the president, but the existence of the power was soon recognized and established, and acted on in the practice of the government, except as to the judicial officers of the United States which do not, it seems, include territorial judges, and, as a result of the recognition of the power of removal in the executive, impeachments have been infrequent and unnecessary in the ordinary operations of government.²⁸

§ 109. **Same—Restraint upon the pardoning power of the president.**—Lord Danby, upon being required to give in his written answer to the charges of the commons, pleaded a pardon, secretly obtained from the king, in bar of the prosecution of the

²⁷ U. S. Const. art. I, sec. 2, cl. 5, and sec. 3, cls. 6, 7; art. II, sec. 2, cl. 1, and sec. 4, cl. 1.

²⁸ *Parsons v. United States*, 167 U. S. 324, 344 (42:185).

impeachment. It was, however, insisted by the commons that neither a general nor a special pardon from the king could be pleaded in answer to an impeachment by the commons, so as to prevent further proceedings in it, claiming that it was evident that a minister who had influence enough to obtain such an indemnity, might set both houses of parliament at defiance, and the pretended responsibility of the crown's advisers, which was accounted the palladium of the English constitution, would be an idle mockery, if not only punishment could be averted, but inquiry frustrated; but this point was not then decided.²⁹ It was provided by the Act of Settlement, that no pardon under the great seal of England be pleadable to an impeachment of the commons in parliament;³⁰ notwithstanding this statute, it was, after its enactment, determined by the house of lords that the king had a right, after conviction and sentence, to reprieve in cases of impeachment.³¹ It was held that the words of the act of settlement conceded, tacitly, the crown's right to grant a reprieve, or pardon after conviction and sentence; and, it would seem that to prevent the possibility of such a result, our constitution provides that: the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachments."³²

§ 110. Same—Right of trial by common law jury.—The constitution declares that: "The trial of all crimes, except in cases of impeachments, shall be by jury;"³³ yet, inasmuch as the judgment in such cases cannot extend further than to removal from office and disqualification to hold office,³⁴ in no case can a fine, or amercement, or forfeiture, or imprisonment, or capital execution, ever be inflicted on any person as a penalty for the violation of any law of the United States, except upon conviction by an impartial jury of the state and district wherein the crime shall have been committed.³⁵

²⁹ Hallam's Const. Hist. England, 465, 466.

³⁰ IV Blackst. Com. 261; 12 & 13 Wm. III, c. 2; Hallam's Const. Hist. England, 466.

³¹ Hallam's Const. Hist. England, 466, 467. Reprieve actually granted to three of the six peers

concerned in the rebellion of 1715; Parl. Hist. VII, 283.

³² U. S. Const. art. II, sec. 2, cl. 1.

³³ U. S. Const. art. III, sec. 2, cl. 3.

³⁴ U. S. Const. art. I, sec. 3, cl. 7.

³⁵ U. S. Const. VI art. of Amndt.

§ 111. **Due process of law—Maxims of the English constitution and the common law.**—The English constitution and the common law, from the early history of that nation, embodied the spirit and genius, and the essential principles, of free political institutions, among which must be reckoned due process of law, although those principles were frequently and at long periods of time obscured by the perpetual aggressions of the crown and the delinquencies of servile ministers and judges. Among the maxims of the English constitution and the common law, which stood as direct guaranties of civil liberty, were the following: (1) The government of the English commonwealth is a government restrained and limited by law. (2) The king has no power except that which is given to him and vested in him by law, and the bounds and limits of that power are known. (3) The laws of England do not receive their force from any power communicated by the king to parliament, but such laws are made by, and receive their force from the whole body politic, the whole realm of England. (4) The king's act or grant made contrary to the law is void. (5) Parliament has the right, without let or interruption, to inquire into, and obtain the redress of public grievances. (6) It is the indubitable right of the people of the kingdom "to be guided and governed by the certain rule of the law," and not by any uncertain or arbitrary form of government; and not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of the land, or the statutes made by their common consent in parliament. (7) The common law of England has always abhorred the accursed mysteries of a prison-house, and neither admits of torture to extort confession, nor of any penal affliction not warranted by a judicial sentence. (8) The open administration of justice according to known laws truly interpreted, and fair construction of evidence.³⁶

§ 112. **Same—Means and methods by which these guaranties were violated.**—The guaranties of civil liberty mentioned in the section next preceding were invaded and violated by such means and methods as the following: (1) By proclamations of the king, in which he assumed to modify, alter, change, sus-

³⁶ Hallam's Const. Hist. England, 93, 127, 128, 132, 133, 134, 138, 189, 224, 526.

pend or supersede acts of parliament and the rules and procedure of the common law. (2) By warrants, issued by the special command of the king, specifying no particular ground of arrest, detention, or commitment. (3) By the procedure, judgments, sentences, penalties and punishments of the privy-council, the star chamber, the "court of the president and council of the north," and the court of high commission, all which were contrary to the rules, principles and procedure of the common law, and a usurpation of the jurisdiction of the common law courts, which were the constitutional judicial tribunals of the country for the trial of civil causes, and the indictment, trial and punishment of criminal offenses, whether arising from a violation of the common law or acts of parliament.³⁷ These abuses of the successive administrations in England were a denial of due process of law, and did more to disturb the domestic tranquility of that country than any other one cause; and their occurrence in this country is rendered impossible by the limitations contained in the federal constitution.

§ 113. Due process of law secured by constitutional limitation upon both federal and state governments.—The constitution secures to the people due process of law against the improper action of both the federal and state government; but this result is reached by two separate and distinct amendments to the constitution, the one acting upon and restraining the federal government³⁸ the other acting upon and restraining the state governments.³⁹ There is (1) a due process of law of the federal government and (2) a due process of law of the state governments, and there is some difference in the rules followed by the federal courts, and applied, respectively, to the acts and operations of the two governments; due process of law in the state is regulated by the law of the state,⁴⁰ while, in determining what is due process of law of the federal government, broader principles are applied.⁴¹ Due process of law

³⁷ Hallam's Const. Hist. England, 122, 123, 124, 125, 220, 222, 241, 255, 256, 257, 258, 259, 260, 292, 526.

³⁸ U. S. Const. V art. of Amndt.

³⁹ U. S. Const. XIV . art. of Amndt.

⁴⁰ Walker v. Sauvinet, 92 U. S. 90, 93 (23:678).

⁴¹ Post secs. 110 & 111; Holden v. Hardy, 169 U. S. 366, 398 (42:780).

in the state will not be considered in this connection, but will be reserved for attention in the chapter next succeeding.

§ 114. The constitutional provision securing due process of law as against the action of the federal government.—The fifth amendment to the federal constitution declares that: “no person shall be * * * deprived of life, liberty or property, without due process of law.” This amendment was designed as a limitation upon the federal government, and not upon the state governments,⁴² and there was no such limitation upon the states to be found in the federal constitution until the adoption of the fourteenth amendment.⁴³

§ 115. Same—The inhibition is a restraint on all the departments of the governments.—The constitutional inhibition under discussion was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice;⁴⁴ it is a restraint upon the legislative, executive and judicial departments of the government;⁴⁵ and it relates to that class of rights whose protection is peculiarly within the province of the judicial department;⁴⁶ and, undoubtedly, it is intended that the provision shall be enforced by the courts when cases involving its operation and effect are brought before them, even as against persons assuming to act under the authority of the government.⁴⁷

§ 116. Due process of law defined.—The words, “due process of law” are the equivalent of the words, “the law of the land;” and by “the laws of the land” is meant general and public laws which operate equally upon all members of the community, affecting the rights of all alike.⁴⁸ “Due process of law”

⁴² Ante, secs. 92., 93.

⁴³ Holden v. Handy, 169 U. S. 366, 398 (42:780).

⁴⁴ The Bank of Columbia v. Okely, 4 Wheat. 235 (4:559).

⁴⁵ Murray v. Hoboken Land Co. 18 How. 272 (15:372); United States v. Lee, 106 U. S. 240 (27:171).

⁴⁶ United States v. Lee, 106 U. S. 240 (27:171).

⁴⁷ United States v. Lee, 106 U. S.

240 (27:171); Ex parte Milligan, 4 Wall. 2 (18:281).

⁴⁸ Murray v. Hoboken Land Co. 18 How. 272 (15:372); Davidson v. New Orleans, 96 U. S. 97, 108 (24:616); Janes v. Reynolds, 2 Texas, 250; Jones v. Perry, 10 Yerg. (Tenn.) 59; Vanzandt v. Waddell, 2 Yerg. (Tenn.) 269; Walley's Heirs v. Kennedy, 2 Yerg. (Tenn.) 554; Hoke v. Henderson, 4 Dev. (N. C.) 1; Brown v. Levee

in the federal sense, and in the sense in which those words are used in the fifth amendment to the federal constitution, means that "law of the land" which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.⁴⁹ The words "due process of law," in judicial proceedings, mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the state, or his voluntary appearance.⁵⁰ By "due process of law" is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. There can be no proceeding against life, liberty or property which

Comms. 50 Miss. 468; *State v. Staten*, 6 Coldw. 234, 244; *Green v. Brigs*, 1 Curtis, 311; *Ervine's Appeal*, 16 Pa. St. 256; *Parsons v. Russell*, 11 Mich. 129; *Banning v. Taylor*, 16 Pa. St. 292.

"That the law might extend to all, it is said *per legem terræ*, by the law of the land" (2 Coke Inst. 50)

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the gen-

eral rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land." (Mr. Webster in *Dartmouth College case*, 4 Wheat. 519.)

⁴⁹ *Hurtado v. California*, 110 U. S. 625 (40:1097).

⁵⁰ *Pennoyer v. Neff*, 95 U. S. 714 (24:565).

may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.⁵¹

§ 117. **The federal rule for determining what is "due process of law."**—It is manifest that it was not left to the legislative power to enact any process which it might devise. The constitutional provision securing due process is a restraint on the legislative, as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process." To ascertain whether any given process is "due process," the court will (1) examine the constitution itself, to see whether the process be in conflict with any of its provisions; and (2) if not found to be so, it will then look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. If the process conforms to these, it is "due process of law."⁵² And it has been accordingly held that, inasmuch as there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues, an act of congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was due process of law in such cases.⁵³ A warrant issued by a United States tax collector, under authority of an act of congress, authorizing a sale of property under such warrant, to enforce the collection of taxes due the government, being conformable to the constitution and the usages of the common law, is "due process of law."⁵⁴ The rule obtaining in the federal courts, requiring a

⁵¹ Hagar v. Reclamation Dist.
111 U. S. 701 (28:569).

⁵² Murray v. Hoboken Land Co.,
18 How. 274 (15:373); Springer
v. United States, 102 U. S. 586
(26:253).

⁵³ Murray v. Hoboken Land Co.,
18 How. 274 (15:373).

⁵⁴ Springer v. United States, 102
U. S. 586 (26:253).

resort to the settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, is further illustrated by the doctrine of the supreme court of the United States, as to the necessity of arraignment and plea in criminal cases. That court holds, and it derives it from the English common law, that "due process of law" requires that a person accused of crime, at least in felony cases, must be arraigned and plead to the indictment, or if he stand mute or refuse to plead, the court must enter a plea of not guilty on his behalf, before his trial can rightfully proceed; and, unless such arraignment and plea affirmatively appear from the record, a judgment of conviction cannot be sustained.⁵⁵ The rule is further illustrated in the determination of the supreme court, that a denial, by act of congress, of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise, is not depriving the importer of his property without due process of law, placing the decision upon the ground that by the settled usage and proceeding of the English common law there has always been a summary remedy for the collection of the public revenues.⁵⁶

§ 118. Same—Controlling force of the federal constitution.—

In all cases where the federal constitution has declared the requisites of any process or proceeding, that instrument is absolutely controlling in the ascertainment and determination of what is "due process of law;" but, as the provisions of the constitution are written in the language of the common law, it is interpreted in the light of the principles of that system.⁵⁷ The same rule applies in cases where congress has, in the exercise of the powers conferred upon it by the constitution, prescribed the form and requisites of any process or proceeding.⁵⁸

§ 119. Same—Same—Decision of administrative officers as to right of foreigners to enter the United States.—It is an ac-

⁵⁵ *Crain v. United States*, 162 U. S. 625 (40:1097).

⁵⁶ *Hilton v. Merritt*, 110 U. S. 97 (28:83).

⁵⁷ *Ex parte Bain*, 121 U. S. 1, 14 (30:849); *Ex parte Wilson*, 114 U. S. 418 (29:89); *Mackin v. United States*, 117 U. S. 348 (29:909); *Ex parte Lange*, 18 Wall. 163 (21:872); *Ex parte*

Parks, 93 U. S. 18 (23:787); *Parkinson v. United States*, 121 U. S. 281 (30:959); *United States v. De Walt*, 128 U. S. 393 (32:485).

⁵⁸ *Ekin v. United States*, 142 U. S. 651 (35:146); *Murray v. Hoboken Land Co.*, 18 How. 272 (15:372); *Hilton v. Merritt*, 110 U. S. 97 (28:83).

cepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and senate, or through statutes enacted by congress, upon whom the constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect those powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.

The supervision of the admission of aliens into the United States may be entrusted by congress either to the department of state, having the general management of foreign relations, or to the department of the treasury, charged with the enforcement of the laws regulating foreign commerce; and congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the secretary of the treasury, to collectors of customs, and to inspectors acting under their authority.

And congress may, if it sees fit, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor

acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within the powers expressly conferred upon them by congress, are due process of law.⁵⁹

§ 120. The "due process of law" of the English constitution embodied in the amendments to the federal constitution—The great and fundamental principles of the common law and the English constitution, and which in fact constitute the "due process of law" of the English nation, securing the rights of life, liberty and property of the English people, are embodied in the first ten amendments to the federal constitution, and constitute to a very large extent the "due process of law" of the federal government, and stand as permanent limitations and restraints upon the exercise of federal power. Hence it is, that the substantive principles of what is called "due process of law," are largely defined by, and embraced in, the provisions of the federal constitution, and are, therefore, not subject to change by federal legislation. The first ten amendments are, in the federal sense, "due process of law;" true, indeed, they do not embrace all that is comprehended in the subject, but they do embrace the great and controlling principles.⁶⁰

§ 121. Unreasonable search and seizure.—The fourth amendment to the federal constitution is: "The right of the people to be secure in their persons, houses, papers and effects shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly de-

⁵⁹ *Ekin v. United States*, 142 U. S. 651 (35:1146).

⁶⁰ *Entick v. Carrington*, 19 Howell, St. Tr. 1029; *Money v. Leach*, 3 Burr. 1743; *Sémayne's Case*, 5 Coke, 91; *Wilkes' Case*, 2 Wils. 151, s. c. 19 St. Tr. 1405; *Story on Const.*, secs. 1901, 1902; 2 *May's Constitutional History of England*, 1-47; 15 *Hansard's Parl. Hist.* 1398, 1418; *Boyd v. United States*,

116 U. S. 616, 641 (29:746); *Ex parte Bain*, 121 U. S. 1, 14 (30:849); *Ex parte Wilson*, 114 U. S. 418 (29:89); *Mackin v. United States*, 117 U. S. 348 (29:909); *Parkinson v. United States*, 121 U. S. 281 (30:959); *Brown v. Walker*, 161 U. S. 591 (40:819); *Bram v. United States*, 168 U. S. 532, 573 (42:568).

scribing the place to be searched, and the persons or things to be seized." This is an affirmance and an adoption into our fundamental law of a great constitutional doctrine of the English common law, the flagrant violations of which by the issuance of general warrants, both in England and in the American colonies, just prior to the revolution, no doubt suggested to the founders of our government the propriety and importance of the amendment.⁶¹ It does not require actual entry upon premises and search for, and seizure of, papers to constitute an unreasonable search and seizure within the meaning of this amendment. A compulsory production of a party's private books and papers to be used against him or his property in a criminal or penal proceeding, or for forfeiture, is within the spirit and meaning of the amendment. It is equivalent to a compulsory production of papers to make the non-production of them a confession of the allegations which it is pretended they will prove.⁶² The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are lawful. The seizure of stolen property is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by the revenue laws of the United States from the commencement of the government, and such seizures are not prohibited by the constitution, when made upon warrants lawfully issued. Laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue, use or disposition, such as counterfeit coin, lottery tickets, implements of gambling and the like, are not within the constitutional inhibition.⁶³

§ 122. Same—Requisites of lawful search.—In order to a lawful search and seizure, the following are requisite: (1) A

⁶¹ Story on Const. (2 Ed.), secs. 1901, 1902; Cooley's Const. Lim. (2 Ed.) 367-377; *Boyd v. United States*, 116 U. S. 616, 641 (29:746); Hallam's Const. Hist. England, 220, 222, 241.

⁶² *Boyd v. United States*, 116

U. S. 616, 641 (29:746); *In Re Pacific Ry. Commission*, 32 Fed. 250; *United States v. Nat. Lead Co.*, 75 Fed. 97.

⁶³ *Boyd v. United States*, 116 U. S. 616, 641 (29:746).

warrant must be issued by a judicial officer. (2) No warrant shall issue except upon probable cause. (3) The application for the issuance of the warrant must be supported by oath or affirmation that a crime has been committed. (4) The warrant must particularly describe the place to be searched, and the persons or things to be seized. (5) No warrant can be issued except in cases expressly authorized by law. (6) The warrant should be directed to the sheriff or other proper officer, and not to a private person. (7) The warrant must be made returnable before a judicial officer, who has jurisdiction to inquire into the crime charged. (8) The warrant is not allowed for the purpose of obtaining evidence of an intended crime, but of a crime already committed. (9) No warrant is allowed to be issued for the purpose of seizing and taking from the possession of a person his papers to be used as evidence to convict him of a crime or to forfeit his goods for an offense against the law.⁶⁴

§ 123. No person compelled to be a witness against himself in a criminal case.—The fifth amendment to the federal constitution declares that: “No person shall be * * * compelled in any criminal case to be a witness against himself.” This provision, like the one contained in the fourth amendment against “unreasonable searches and seizures,” is but the adoption, into the fundamental law, of a great constitutional doctrine of the common law. Both the amendments, and the principles embodied in them, relate to the personal security, and the personal liberty of the citizen, and the right of private property, and are closely related to, and mutually throw light on and aid in the interpretation of each other. When the thing forbidden in the fifth amendment, namely, compelling a person to be a witness against himself in a criminal case, is the object of a search and seizure of his private papers, it is an “unrea-

⁶⁴ U. S. Const. IV & V Amendments; Cooley's Const. Lim. ch. X, pp. 367, 375; Hale, P. C., 142, 150, 151; Archbold Cr. Law, 143, 147; Bishop's Cr. Proc. secs. 716, 719; Commonwealth v. Lottery Tickets, 5 Cush. 369; Stone v. Dana, 5 Met. 98; Sandford v. Nichols, 13 Mass. 286; Allen v. Staples, 6 Gray, 491;

McGlenchy v. Barrows, 41 Me. 74; Ashley v. Peterson, 25 Wis. 621; Commonwealth v. Cratty, 10 Allen, 403; Bell v. Clapp, 10 Johns. 263; Hibbard v. People, 4 Mich. 126; Fisher v. McGirr, 1 Gray, 1; Boyd v. United States, 116 U. S. 616, 641 (29:746).

sonable search and seizure'' within the meaning of the fourth amendment. And the seizure or compulsory production of a person's private books and papers to be used as evidence in a criminal case is equivalent to compelling him to be a witness against himself; and a proceeding to forfeit a person's property for an offense against the law, though civil in form, and whether *in rem* or *in personam*, is a criminal case within the meaning of that part of the fifth amendment which declares that "no person shall be compelled in any criminal case to be a witness against himself."⁶⁵

§ 124. **Same—Extent and application of the principle.**—Constitutional provisions for the security of persons and property are liberally construed, and all effort to restrict the operation of the provision under discussion has been repudiated by the supreme court from the earliest period of its history.⁶⁶ Both at common law and under the constitution, the doctrine established is: That no person shall be compelled, in any proceeding, to give any testimony, or make any disclosures, which may tend to criminate him, or subject him to a criminal accusation, or prosecution, or to convict him of any crime, or which may tend to subject him to any fine, penalty, punishment or forfeiture; and the exemption extends, not only to the main criminating facts, but also to every incidental fact or circumstance which might form a link in a chain of evidence, which, if complete, would establish his liability to a criminal accusation, or prosecution, or conviction, or fine, penalty, punishment, or forfeiture. And the exemption protects the person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence

⁶⁵ *Boyd v. United States*, 116 U. S. 616, 641 (29:746); *Lees v. United States*, 150 U. S. 476, 483 (37:1150); *Counselman v. Hitchcock*, 142 U. S. 547, 586 (35:1110).

⁶⁶ *Boyd v. United States*, 116 U. S. 616, 641 (29:148); *Counselman v. Hitchcock*, 142 U. S. 547, 586 (35:1110); *I Burr's Trial*, 244.

concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions, as admissions of facts sought to be established therein.⁶⁷

§ 125. **Same—Meaning of the words, “any criminal case.”**—The privilege secured by the constitutional provision is not limited to a criminal prosecution against the witness. The provision is broadly construed in favor of the right it is intended to secure. Its object is to insure, that no person shall be compelled, when acting as a witness in any investigation, to give testimony, or make disclosures, which might tend to show that he himself had committed a crime, or was guilty of an offense against the law for which his property might be forfeited. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. An

⁶⁷ *Counselman v. Hitchcock*, 142 U. S. 547, 586 (35:1110); *Boyd v. United States*, 116 U. S. 616, 641 (29:748); *Lees v. United States*, 150 U. S. 476, 483 (37:1150); *I Burr's Trial*, 244; *Emery's Case*, 107 Mass. 172, 181; *State v. Nowell*, 58 N. H. 314; *Cullen v. Commonwealth*, 24 Gratt. 624; *Temple v. Commonwealth*, 75 Va. 892; *People v. Mather*, 4 Wend. 229; *Southard v. Rexford*, 6 Cow. 255; *Rex v. Slaney*, 5 Car. & P. 213; *Cates v. Hardacre*, 3 Taunt. 424; *Maloney v. Barkley*, 3 Campb. 210; *Sir John Friend's Case*, 13 How. St. Tr. 16; *Earl of Macclesfield's Case*, 16 How. St. Trials, 767; *Wigram on Discov.* 61, 63; *Hare on Discov.* 131, 156; 2 *Daniell, Chancery Pleading & Prac.* (1st London Ed.) 45, 55; *United States v. Saline Bank*, 1 Pet. 100 (7:69); *Leggett v. Postley*, 2 Paige, Chan. 599; *Livingston v. Harris*, 3 Paige, Chan. 528; *Taylor*

v. Bruen, 2 Barb. Chan. 302; *Union Bank v. Barker*, 3 Barb. Chan. 358; *Entick v. Carrington*, 19 How. St. Trials, 1029.

“The common law maxim (thus affirmed by the bill of rights) that no one shall be compelled to testify to his own criminality, has been understood to mean, not only that the subject shall not be compelled to disclose his guilt upon a trial of a criminal proceeding against himself, but also that he shall not be required to disclose, on the trial of issues between others, facts that can be used against him as admissions tending to prove his guilt of any crime or offense, of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission, or his connection with it, may be obtained.” (*State v. Nowell*, 58 N. H. 314).

investigation before a grand jury to inquire and ascertain whether there has been a criminal offense committed, is a "criminal case," within the meaning and intent of the provision, and a witness testifying before the grand jury, who is apprehensive that his answers may tend to criminate him, may claim the privilege.⁶⁸ And a proceeding to forfeit a person's goods, for an offense against the law, whether *in rem* or *in personam*, though civil in form, is a "criminal case" within the meaning of the provision.⁶⁹

§ 126. ~~Same—Same—~~**Discovery in a suit in chancery.**—The nature and character of the investigation in which it is attempted to compel a person to give testimony, or make disclosures which will tend to criminate him, or subject him to a penalty, or forfeiture, are wholly immaterial; whatever may be the form of the proceeding, the constitutional privilege may be claimed. And when a bill is filed in chancery for discovery, or relief and discovery, the constitutional provision interposes to protect the defendant from giving any discovery, whether by the statement of facts within his knowledge, or the production of his private books and papers, which may subject him to a criminal accusation, or prosecution, or tend to convict him of any crime, or tend to subject him to a penalty, or the forfeiture of his property.⁷⁰ The first congress of the United States, whose members well understood the limitations established by the English chancery upon the right of discovery, and that such right was restricted within the rule of the common law which secured witnesses against self-accusation and self-crimination, embodied a provision in the original judiciary act, which may be accepted as a contemporaneous exposition of the constitutional amendments submitted at the same session, showing that the intention was to extend its operation to every possible character of proceeding and investigation.⁷¹ The stat-

⁶⁸ *Counselman v. Hitchcock*, 142 U. S. 547, 586 (35:1110).

⁶⁹ *Boyd v. United States*, 116 U. S. 616, 641 (29:748); *Lees v. United States*, 150 U. S. 476, 483 (37:1150).

⁷⁰ *Boyd v. United States*, 116 U. S. 616, 641 (29:748); *Wigram on Discov.* 61, 63; *Hare on Discov.* 131, 156; *Leggett v. Postley*, 2

Paige, Chan. 599; *Livingston v. Harris*, 3 *Paige*, Chan. 528; *Taylor v. Bruen*, 2 *Barb. Chan.* 302; *Union Bank v. Barker*, 3 *Barb. Chan.* 358; *United States v. Saline Bank*, 1 *Pet.* 100; 2 *Daniell* (1st Lond. Ed.) 45, 55; *People v. Mather*, 4 *Wend.* 229.

⁷¹ *Boyd v. United States*, 116 U. S. 616, 641 (29:748).

utory provision is as follows: "All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default."⁷²

§ 127. Same—Same—Statutes protecting witnesses from prosecution.—In some of the states, where there are like constitutional provisions protecting persons from making disclosures tending to criminate themselves, attempts have been made by legislation to take away the constitutional privilege, by declaring that there shall be no future criminal prosecution against witnesses for the matters concerning which they may have testified, or at least enabling them to plead the statute in absolute bar of such prosecution.⁷³ But in the federal courts, a statute which leaves the party or witness subject to prosecution after he has made the criminating disclosures, or given the criminating evidence, can not have the effect of taking away the privilege conferred by the constitution of the United States. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the testimony and disclosures relate; and section 860 of the United States Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition.⁷⁴

⁷² 1 U. S. Stat. at L. ch. 20, pp. 73, 79, Section 15.

⁷³ State v. Quarles, 13 Ark. 307; Higdon v. Heard, 14 Ga. 255; Ex parte Rowe, 7 Cal. 184; Wilkins v. Malone, 14 Ind. 153; People v. Kelly, 24 N. Y. 74; Emery's Case,

107 Mass. 172; Cullen v. Commonwealth, 24 Gratt. 624; Temple v. Commonwealth, 75 Va. 892; State v. Nowell, 58 N. H. 314; People v. Sharp, 107 N. Y. 427; Bedgood v. State, 115 Ind. 275.

⁷⁴ Counselman v. Hitchcock, 142

§ 128. **Same—Same—Act in relation to testimony before the Interstate Commerce Commission and in prosecutions under the Anti-trust Act.**—The act of congress in relation to testimony before the Interstate Commerce Commission, approved February 11, 1893, declares: "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense, and

U. S. 574, 586 (35:1110); *Boyd v. United States*, 116 U. S. 616, 641 (29:748). Sec. 860 U. S. R. S. is as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or

estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." And see also, 15 U. S. Stat. at L. chap. 13, sec. 1.

upon conviction thereof by a court of competent jurisdiction, shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.”⁷⁵ And by act of February 25, 1903, like immunity is given to witnesses testifying or producing evidence in suits, proceedings or prosecutions under the interstate commerce, anti-trust, and other acts of congress.⁷⁶ It has been held by the supreme court that, while the constitutional amendment protecting persons from being compelled to be a witness against themselves in criminal matters is justly regarded as one of the most valuable prerogatives of the citizen, yet its object is fully met by the immunity given in these statutes, and witnesses subpoenaed under them are compellable to answer,⁷⁷ or produce the papers called for, as the case may be.⁷⁸ This legislation protects witnesses from such use of their testimony as will result in their punishment for crime, or forfeiture of their estates; testimony given, or papers produced under the immunity secured by the statute presents scarcely a suggestion of an unreasonable search or seizure.⁷⁹

§ 129. The maxim *Nemo tenetur seipsum accusare*—Its history.—The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the revolution in 1688, which resulted in the expulsion of the Stuarts from the British throne, and the erection of additional barriers for the protection of the English people against the exercise of arbitrary power, was not uncommon, even in England. While the admissions or confessions of a person charged with crime,

⁷⁵ 27 U. S. Stat. at L. chap. 83, pp. 443, 444.

⁷⁶ 32 U. S. Stat. at L. ch. 755, p. 904; *Hale v. Henkel*, 201 U. S. 43, 77 (50:652).

⁷⁷ *Brown v. Walker*, 161 U. S. 591 (40:819); *Hale v. Henkel*, 201 U. S. 43, 77 (50:652); *Nelson v. United States*, 201 U. S. 92 (50:673).

⁷⁸ *Interstate Commerce Com-*

mission v. Baird, et al, 194 U. S. 25-47 (48:860); *Hale v. Henkel*, 201 U. S. 43, 77 (50:652); *Nelson v. United States*, 201 U. S. 92 (50:673).

⁷⁹ *Interstate Commerce Commission v. Baird et al*, 194 U. S. 25-47 (48:860); *Hale v. Henkel*, 201 U. S. 43, 77 (50:652); *Nelson v. United States*, 201 U. S. 92 (50:673).

when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, and such admissions and confessions, when so voluntarily and freely made, have always been held admissible in evidence against the accused, even in capital crimes, yet, the experience of mankind in the administration of criminal justice has shown that if an accused person be asked to explain his apparent connection with a crime under investigation, the questions put to him do with the greatest ease and facility assume an inquisitorial character, and there is great temptation on the part of his interlocutor to press him unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, and these tendencies made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made the denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional inhibition.⁸⁰

⁸⁰ *Brown v. Walker*, 161 U. S. 591, 638 (40:819).

It would seem that no principle is more firmly fixed in English and American civilization and jurisprudence, than the principle that no person "shall be compelled in any criminal case to be a witness against himself." If constitutional provisions be evidence of national sentiment, then this principle is written upon the hearts of the American people; it is found not only in the federal constitution, but in the constitution of every state in the union.

It flows like a mighty current of life-blood through the heart of the nation. But it is suggested by a high authority that this principle should be abandoned. XXXIX Am. Law Rev. No. 4, 599-601). It may be readily conceded that the Roman Civil law is the "finest system of written reason in the world," and a comparative study of the civil and common law would lead to an enrichment of our jurisprudence; but it may be safely affirmed that the examination and cross-examination of persons accused of

§ 130. Same—Test of admissibility of confessions.—In criminal trials, in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution, commanding that no person “shall be compelled in any criminal case to be a witness against himself.” This generic language of the amendment is but a crystalization of the doctrine of the common law as to confessions, well settled when the amendment was adopted, and in its application it is necessary to resort to the rules of the common law upon the subject, as expounded and formulated by the text writers and adjudicated cases. There can be no doubt that long prior to the American revolution and the organization of the federal government, the doctrine that no person could be compelled to accuse himself of crime or testify against himself in a criminal case, had reached its full development in the common law, and was considered as resting on the law of nature, and was firmly imbedded in that system as one of its great and distinguishing attributes; and it was the purpose of the fourth and fifth amendments to perpetuate that great doctrine in our institutions, in the fullness of its integrity, free from the possibilities of future legislative change.

But whilst the constitution perpetuates the principle, it does not undertake to furnish a rule by which to determine what are voluntary confessions, and what are involuntary confessions; this, as above indicated, must be determined by a resort to the rules of the common law upon the subject, as formulated in the manner above stated.

It is clear that, in determining in any given case whether a confession is voluntary, and whether the proper foundation has been laid for its admission in evidence against the accused, is, not how far the confession tends to prove his guilt; such confession having been offered in evidence as a confession, and being admissible on that ground only, a consideration of its evidential weight and value cannot arise upon the issue of its admissibility. If, in the appellate court, the confession is found to have been illegally admitted in evidence, reversible

crime has been the instrument of other contrivance invented by the more judicial murders than any ingenuity of man.

error will result; because the prosecution cannot, on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove the guilt of the accused.

The true test of the admissibility of a confession is, that it is made freely, voluntarily, and without compulsion or inducement of any sort. In order to render a statement admissible, the proof must be sufficient to establish the fact, that the making of it was voluntarily; that is to say, that from causes which the law treats as legally sufficient to engender in the minds of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. "But a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." And "the rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in its terms, it is an accusation of another, or a refusal to confess."⁸¹

§ 131. Fourth and fifth amendments violated by federal legislation.—Judge Cooley, in his "Constitutional Limitations," after referring to the struggle in England, just before our revolution, for the preservation of the common-law guaranties of personal security and civil liberty, approaches the discussion of the fourth amendment with these words: "All these matters are now a long way in the past; but it has not been deemed unwise to repeat in the state constitutions, as well as in the consti-

⁸¹ *Bram v. United States*, 168 U. S. 613, 624 (40: S. 532, 573 (42:568) and authorities cited; *Wilson v. United States*, 162 U. S. 613, 624 (40: 1090.

tution of the United States, the principles already settled in the common law upon this vital point in civil liberty.”⁸² If there was ever any doubt as to the wisdom of embodying in the federal constitution the great common-law principles of civil liberty, that doubt has been dispelled by a decision of the United States supreme court, announced in 1885, and since the publication of the fourth edition of Judge Cooley’s work, holding void certain federal legislation, as being in violation of the fourth and fifth amendments, and which Justice Bradley characterized as “abhorrent to the instincts” of both the English and American people.⁸³ The purposes of that legislation were to prevent and detect frauds upon the revenue, and to impose penalties and forfeitures upon the offenders, and authorized the district judges whenever it should appear to their satisfaction by affidavit, that a fraud upon the revenue had been committed or attempted by persons interested or engaged in the importation of merchandise, to issue warrants to the marshals or fiscal officers of the government, directing such officers or their agents and assistants to enter any place or premises where any invoices, books or papers relating to such merchandise or fraud were deposited, and to seize and carry away the same, to be inspected and used as evidence by the officers of the government in prosecuting the offenders. When those acts had been in force about five years, the attention of congress was called to their harsh and objectionable features, and an act was then passed providing that: No answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness, shall be given in evidence, or used against such party or witness, or his property or estate, in respect to any crime, or for the enforcement of any penalty or forfeiture, by reason of any act or omission of such party or witness.⁸⁴

The act last mentioned had the effect to repeal those parts of the former acts which had afforded the officers of the government the convenient method, by warrants, of obtaining evi-

⁸² Constitutional Limitations (4th Ed.) ch. X. pp. 371, 372.

⁸³ 12 U. S. Stat. at L. ch. 76, sec. 7, p. 740; 14 U. S. Stat. at L. ch. 188, sec. 2, p. 547; 18 U. S. Stat. at L. ch. 391, sec. 5, p.

187; *Boyd v. United States*, 116 U. S. 616, 641 (29:746); *Counselman v. Hitchcock*, 142 U. S. 547, 586 (35:1110).

⁸⁴ 15 U. S. Stat. L. ch. 13, p. 37.

dence in suits for penalties and forfeitures against violators of the revenue laws;⁸⁵ and in a subsequent act revising the laws upon the subject of revenue frauds and prosecutions therefor, it was provided that: In proceedings for forfeitures and penalties under the act, the court upon the application of the district attorney, should make an order requiring the defendant or claimant to produce in evidence any book, invoice, or paper belonging to or under his control, and which would in the belief of the district attorney tend to prove any allegation made by the United States; and if the defendant or claimant should, after notice, fail or refuse to comply with the order the allegations of the government should be taken as confessed, unless the failure or refusal should be explained to the satisfaction of the court.⁸⁶ The supreme court, in a case decided by it at the October term, 1885, held that the provision of the act last above referred to, is unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods; being repugnant to the fourth and fifth amendments of the constitution; and that an order of the court made under the act, in a suit to establish a forfeiture of the claimant's goods, and requiring him to produce his invoice in court for the inspection of the government attorney and to be offered in evidence by him, was an unconstitutional exercise of authority, and the inspection of the invoice by the attorney and its admission in evidence were erroneous and unconstitutional proceedings.⁸⁷ The decision in that case has been twice approved by the supreme court.⁸⁸

§ 132. Presentment or indictment by grand jury required in prosecution for infamous crimes.—"No person," it is declared by the fifth amendment to the federal constitution, "shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." In all criminal prosecutions in the courts of the United

⁸⁵ *Boyd v. United States*, 116 U. S. 616, 641 (29:746).

⁸⁶ 18 U. S. Stat. at L. chap. 391, sec. 5, p. 187.

⁸⁷ *Boyd v. United States*, 116 U. S. 616, 641 (29:746).

⁸⁸ *Counselman v. Hitchcock*, 142 U. S. 547, 586 (35:1110); *Lees v. United States*, 150 U. S. 476 (37:1150).

States, in the classes of cases mentioned in this constitutional provision, "a presentment or indictment of a grand jury" is *jurisdictional*, and the court has no authority to proceed without it.⁸⁹ By the English common law, informations by the attorney general, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was meant any offense which at common law operated to cause a total forfeiture of the offender's lands, or goods, or both; the question whether the prosecution must be by indictment, or might be by information depended upon the consequences to the convict himself. The fifth amendment, declaring in what cases a grand jury should be necessary, and in effect affirming the rule of the common law upon the same subject, substituting for capital crimes or felonies, the words "a capital or otherwise infamous crime," manifestly had in view that rule of the common law, and the framers of the amendment used the language just quoted in the full sense of its value and of its necessity.⁹⁰

§ 133. Office and functions of the grand jury.—The office and functions of the grand jury, as an institution of the English common law were two fold, namely: (1) To present to the courts having criminal jurisdiction formal written accusations against persons who had been guilty of the commission of crimes; and (2) to prevent unfounded, unjust and malicious prosecutions against innocent persons. And upon these great principles of public policy and public justice, the institution was adopted as an agency of the federal government.⁹¹

The origin, development, history and functions of this institution, and its usefulness as an instrumentality of government have been stated by a distinguished jurist in the following language: "The institution of the grand jury is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it

⁸⁹ *Ex parte Bain*, 121 U. S. 1, 14 (30:849); *Mackin v. U. S.* 117 U. S. 348 (29:909); *Ex parte Wilson*, 114 U. S. 418 (29:89); *Parkinson v. U. S.*, 121 U. S. 281 (30:959).

114 U. S. 418 (29:89); *Mackin v. United States*, 117 U. S. 348 (29:909); *U. S. v. De Walt*, 128 U. S. 393 (32:485).

⁹¹ *Ex parte Bain*, 121 U. S. 1, 14 (30:849); *Jones v. Robbins*, 8 Gray, 329.

⁹⁰ *Ex parte Bain*, 121 U. S. 1, 14 (30:849); *Ex parte Wilson*,

would seem from the accounts of commentators on the laws of that country that it was at first a body, which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.”⁹²

⁹² Field, Justice, charge to Grand Jury, reported in 2 Sawy. 667, and quoted in the opinion of the court in *Ex parte Bain*, supra.

“It has been said that, since there is no danger to the citizen from the oppression of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever

force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw, ‘individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the pro-

§ 134. Indictment cannot be amended or changed by the court.—It is beyond question, that, at common law, indictments could not be amended; and the same rule prevails under the federal constitution. Indictments are found upon the oaths of the grand jury, and cannot be amended or changed by the order of the court. It is settled by both authority and reason that after an indictment has been changed, it is no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which the constitutional provision was intended to protect, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or order of the court in the body of the indictment presented by the grand jury, and the prisoner can be called upon to answer the indictment as amended and changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisites of an indictment, in reality no longer exist. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be “held to answer,” he is then entitled to be discharged so far as the offense as originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There is, in such case, nothing before the court on which it can hear evidence or pronounce sentence.⁹³

§ 134a. Defendant discharged on habeas corpus when convicted of infamous crime without indictment of grand jury.—No court of the United States has jurisdiction to try and punish a person for an infamous crime, except upon presentment

sentment and indictment of such a jury; and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious, and op-

pressive public prosecutions.’”
Ex parte Bain, *supra*.

⁹³ Ex parte Bain, 121 U. S. 1, 14 (30:849).

of a grand jury; and the trial, conviction, and punishment of a person for such crime, upon an *information* is *coram non judice* and void; and the supreme court will discharge the defendant upon *habeas corpus*.⁹⁴ And so where a person is tried for and convicted of such crime upon an indictment which was once valid, but which, before the trial, was changed or amended by order of the court the defendant will be discharged.⁹⁵

§ 135. “**Infamous crime**” defined.—In the sense of the fifth amendment to the constitution, and also of the federal statutes, a crime punishable by imprisonment in a state prison or penitentiary with or without hard labor is an infamous crime; and in determining whether a crime is infamous, the question is, whether it is one for which the court is authorized to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.⁹⁶ Under the present law, it is only in cases where a person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, that the sentence can be executed in a state prison or penitentiary; and the order of a federal court directing that a sentence of imprisonment for a period not greater than one year shall be executed in a penitentiary is void.⁹⁷

§ 136. **Same—Felony**.—It does not necessarily follow that, because the punishment affixed to an offense against the United States is infamous, the offense itself is thereby raised to the grade of felony.⁹⁸ The word “felony” was used at common law to denote offenses which occasioned a forfeiture of the lands, or goods, or both, of the offender, to which capital or other punishment might be superadded, according to the degree of guilt.⁹⁹ By statute in some of the states, the word

⁹⁴ *Ex parte Wilson*, 114 U. S. 417 (29:89); *Ex parte Mills*, 135 U. S. 263 (34:107).

⁹² *Ex parte Bain*, 121 U. S. 1, 14 (30:849).

⁹⁶ *United States v. De Walt*, 128 U. S. 393 (32:485); *Mackin v. United States*, 117 U. S. 348 (29:909); *In re Claassen*, 140 U. S. 200 (35:409); *Ex parte Wilson*, 114 U. S. 417 (29:89); *Parkinson*

v. United States, 121 U. S. 281 (30:959); *Ex parte Mills*, 135 U. S. 263 (34:107).

⁹⁷ *Ex parte Mills*, 135 U. S. 263 (34:107).

⁹⁸ *Bannon v. United States*, 156 U. S. 464 (39:494).

⁹⁹ *Bannon v. United States*, 156 U. S. 464 (39:494); *Ex parte Wilson*, 114 U. S. 417 (29:89).

“felony” is defined to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the state prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender.¹ The common law definition of felony is not applicable in the American system of jurisprudence, as crimes do not, in this country, work a forfeiture of estate. There is no statutory definition of felonies in the legislation of the United States, and the definition must be sought elsewhere, and more particularly in federal decisions of authority, by which some general rules have been established.² When a federal statute creating an offense declares that the prohibited act shall be a misdemeanor, that fixes the classification of the offense.³ And when the statute creating and defining an offense makes use of such terms as “robbery” or “burglary,” or other words which have a well-defined meaning in the common law, they are used in the statute in their common law sense; and if the words import a felony at common law, then the offense created by the statute is a felony, unless otherwise defined in the statute. In such case the words of the statute are held to create such serious offense as was at common law punishable by death or forfeiture of the lands and goods of the offender; and, therefore, classed as felony.⁴ It is said that the federal decisions have established the following rules, namely: The term “felony” as used in the federal statute prescribing the number of challenges in criminal trials includes the following classes of cases: (1) Where the offense is by statute declared to be felonious, expressly or by implication; (2) Where the offense is not defined by statute, but is designated by its common law name a felony, known as such at the common law; (3) When congress adopts a state law as to an offense made by the law of the state a felony.⁵

¹ *Bannon v. United States*, 156 U. S. 464 (39:494).

² *Reagan v. United States*, 157 U. S. 301 (39:709); *Considine v. United States*, 112 Fed. 342.

³ *Reagan v. United States*, 157 U. S. 301 (39:709); *Considine v. United States*, 112 Fed. 342.

⁴ *Harrison v. United States*, 163 U. S. 140 (41:104); *Bannon v. United States*, 156 U. S. 464 (39:494); *Ex parte Wilson*, 114 U. S. 417 (29:89); *Considine v. United States*, 112 Fed. 342.

⁵ *U. S. v. Coppersmith*, 4 Fed. 198, and authorities cited; *Con-*

§ 137. Exception to the constitutional rule requiring indictments in the prosecution of infamous crimes—Land and naval forces—Militia in actual service.—The provision of the fifth amendment requiring that capital or otherwise infamous crimes must be prosecuted by “presentment or indictment of a grand jury,” contains the following exception:

“Except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger.” The words, “when in actual service in time of war or public danger,” apply to the militia only. All persons in the military or naval service of the United States are subject to the military law: the members of the regular army and navy at all times; the militia so long as they are in such service.⁶

§ 138. Constitutional right of trial by jury in criminal cases.—The right of trial by jury is secured to all persons accused of crime in the courts of the United States,⁷ except in cases of impeachment, and also except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger;⁸ and the constitutional provisions securing this right apply to the people of the territories of the United States, as well as to the people of the several states.⁹

§ 139. Same—It is a common law jury of twelve men, and a trial according to the rules of the common law.—The words “jury” and “trial by jury” have the same meaning in the constitution which was affixed to them in the common law as it was settled and understood in this country and in England at the time of the adoption of that instrument. The jury referred to is a jury constituted, as at common law, of twelve

sidine v. United States, 112 Fed. 342.

⁶ Johnson v. Sayer, 158 U. S. 109 (39:914). When a court martial, having jurisdiction of the person accused and of the offense charged, acts within the scope of its lawful authority, its decision and sentence cannot be reviewed or set aside by the civil courts, by habeas corpus or otherwise. Dynes v. Hoover, 20 How. 65 (15:838); Ex parte Reed, 100 U. S. 13 (25:38); Ex parte Ma-

son, 105 U. S. 696 (26:1213); Smith v. Whitney, 116 U. S. 167 (26:601); Johnson v. Sayer, 158 U. S. 109 (39:914).

⁷ U. S. Const. art. III, sec. 2, cl. 3; VI art. of Amendment.

⁸ Ex parte Milligan, 4 Wall. 2 (18:281); Johnson v. Sayer, 158 U. S. 109 (39:914).

⁹ Thompson v. Utah, 170 U. S. 343, 355 (42:1061); Reynolds v. United States, 98 U. S. 145 (25:244); Callan v. Wilson, 127 U. S. 540, 551 (32:223).

men, neither more or less. And the trial by jury secured is a trial by a jury of twelve men, conducted according to the settled rules of the common law, and in a court of common law, by the oral testimony of witnesses, in the presence of the judge and jury, and under the inspection and direction of the judge, with exclusive authority in the jury to determine the fact of guilt or innocence, and in whose verdict there shall be absolute unanimity; and it is not within the power of a person accused of a felony, by consent expressly given or by his silence, to authorize a jury of less than twelve men to pass upon the question of his guilt. The guaranty of a trial by jury, contained in the third article of the constitution, secures a trial in the mode and according to the settled rules of the common law, and the enumeration in the sixth amendment of the rights of the accused in a criminal prosecution are a declaration of what those rules are, and their embodiment in the amendment is to be referred to the anxiety of the people of the states to have in the supreme law of the land a full and distinct recognition of those rules, made binding on the national government, as essential to the preservation of the fundamental rights of life, liberty and property.¹⁰

§ 140. **Same—Speedy and public trial.**—The constitution¹¹ secures a “speedy and public trial by an impartial jury,” to all persons accused of crime in the courts of the United States. The constitutional provision in this respect is declaratory of a great and fundamental rule of the common law, but a rule which had been shamefully violated by the English government, especially during the reign of the Tudors and Stuarts; and it cannot be doubted that the statesmen who framed the sixth amendment, and the people of the states who adopted it, had in mind (1) the cruel and secret proceedings of the star chamber, and (2) the corrupt practices of the crown, and its pusillanimous judges and ministers and sheriffs in “packing” the jury panel, and intimidating juries and imposing upon them penalties for verdicts of acquittal in crown cases.¹² It was, undoubtedly, the purpose and intent of the constitution to secure in all criminal prosecutions a jury which would be im-

¹⁰ Thompson v. Utah, 170 U. S. 343, 335 (42:1061); Sparf v. United States, 156 U. S. 51-183 (39:343).

¹¹ VI art. of Amendment.

¹² Hallam's Const. Hist. of England, 139, 498, 499.

partial as between the government and the accused, and to prevent the exercise of any power or influence by the government or its officers which would tend to limit in any degree the impartiality and independence of juries in the exercise of their functions as judges of the fact of the guilt or innocence of the accused.

§ 141. Same—When crimes against federal laws are local and when not.—Crimes committed against the laws of the United States, when committed within the limits of a state are local, and must be tried in the state and district wherein the crime shall have been committed, and before a jury thereof, which district shall have been previously ascertained by law; but when the crime is not committed within any state, the trial shall be had at such place or places as the congress may, by law have directed.¹³ Congress has directed that the trial of all offenses committed against the laws of the United States upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found or into which he is first brought.¹⁴ The circuit court of each district sits within and for that district; and its jurisdiction as a general rule is bounded by its local limits.¹⁵ At the same time, courts may be required to be held at different places in a judicial district, and prosecution for offenses committed in certain counties may be required to be tried, and writs and recognizances to be returned at each place, but this does not affect the power of the grand jury sitting at either place to present indictments for offenses committed anywhere within the district.¹⁶ As to where trials shall be had in a judicial district, that depends entirely upon legislation upon the subject.¹⁷

¹³ United States v. John, 1 Black, 484, 488 (17:225); United States v. Dawson, 15 How. 463 (14:775); Jones v. United States, 137 U. S. 211 (34:695); Cook v. United States, 138 U. S. 181, 182 (34:913); U. S. Const. art. III, sec. 2, cl. 3; U. S. Const. VI art. of Amndt.

¹⁴ Jones v. United States, 137 U. S. 202, 224 (34:691). Cook v. United States, 138 U. S. 181, 182

(34:913); U. S. Rev. Stat. sec. 730.

¹⁵ Toland v. Sprague, 12 Pet. 300, 328 (9:1093); Devoe Mfg. Co., Petitioner, 108 U. S. 401 (27:764); Barrett v. United States, 169 U. S. 221 (42:724).

¹⁶ Logan v. United States, 144 U. S. 263 (36:429); Barrett v. United States, 169 U. S. 221 (42:724).

¹⁷ Rosecrans v. United States,

§ 142. **Same—Right of accused to be informed of the nature and cause of the accusation.**—“In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and course of the accusation.”¹⁸ This can be legally done only in the indictment, or presentment or information. To meet the constitutional requirement, the indictment must charge the crime with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged; even in cases of misdemeanor, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. And in an indictment upon a statute for a statutory offense, it is not sufficient to charge the offense in the words of the statute, unless those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The true test is, not whether the indictment might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against or should be taken against him for a similar offense, whether the record shows with certainty to what extent he may plead a former acquittal or conviction.¹⁹ But one count in an indictment may refer to matter in a previous count so as to avoid unnecessary repetition; and if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made.²⁰

165 U. S. 257 (41:708); *Post v. United States*, 153 U. S. 584, 587 (38:830); *Potter v. United States*, 155 U. S. 438 (39:214).
 161 U. S. 583 (40:816); *Barrett v. United States*, 169 U. S. 221 (42:724).

¹⁸ U. S. Const. VI art. of Amndt.

¹⁹ *Cochran v. United States*, 157 U. S. 286, 299 (39:704); *Evans v.*

²⁰ *Crain v. United States*, 162 U. S. 625, 650 (40:1097); *Blitz v. United States*, 153 U. S. 308, 317 (37:725).

§ 143. **Same—Right of accused to be confronted with the witnesses against him—Exceptions—Dying declarations.**—“In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.”²¹ A person accused of having received stolen goods with intent to convert them to his own use, knowing at the time they were stolen, is not, within the meaning of the constitution, confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel; and the provision of a statute passed by congress “to punish certain larcenies and the receivers of stolen goods,” that the judgment of conviction of the principal felon shall be conclusive evidence in the prosecution of the receiver of stolen property, that the property therein described and alleged to have been embezzled, stolen or purloined, had been embezzled, stolen or purloined, is in violation of the constitutional provision securing to the accused the right to be confronted with the witnesses against him.²² “To the rule that an accused is entitled to be confronted with the witnesses against him, the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the constitution, and was not intended to be abrogated by it. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon oath,—‘the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth.’ ”²³ Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him. But it must be shown by the party offering them in evidence that they were made

²¹ U. S. Const. VI art. of Amndt.

²² Kirby v. United States, 174 U. S. 47, 64 (43:890); Commonwealth v. Elisha, 3 Gray, 460.

²³ Mattox v. United States, 146

U. S. 140, 153 (36:917); Kirby v. United States, 174 U. S. 47, 64 (43:890).

under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from the conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. The length of time elapsing between the making of the declaration and the death is one of the elements to be considered, although it is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible. The point is to ascertain the state of the mind of the declarant at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected.²⁴ The constitutional right of the accused to be confronted with the witnesses against him is violated by the admission in evidence of the statement or deposition of a witness taken at the examining trial, where it did not appear that the witness was absent from the trial by the suggestion, procurement, or act of the accused, but, on the contrary, his absence was manifestly due to the negligence of the officers of the government.²⁵ If the witness is absent from the trial by the wrongful procurement of the accused, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guaranty an accused person against the legitimate consequences of his own wrongful act. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when the witnesses are absent by his procurement, evidence is supplied in some lawful way, he is

²⁴ *Mattox v. United States*, 146 U. S. 140, 153 (39:917).

²⁵ *Motes v. United States*, 178 U. S. 458, 476 (44:1150).

in no condition to assert that his constitutional rights have been violated. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and consequently, if there has not been in legal contemplation a wrong committed, the way has not been opened for dispensing with the presence of the witness and the introduction of testimony to supply that which is lost by his absence.²⁶ The constitutional right of the accused to be confronted with the witnesses against him is not violated nor infringed by the admission in evidence, upon the trial, of a transcribed copy of the reporter's stenographic notes of the testimony of two witnesses, whose testimony was given on a former trial, and who have since died, the copy being supported by the testimony of the reporter that it was correct.²⁷ The constitutional provision under consideration relates to a prosecution of an accused person which is technically criminal in its nature, and its protection does not extend to a suit brought under the customs administrative act, to recover the value of merchandise forfeited to the United States under that act, and, on trial of such suit, a deposition duly taken in a foreign country and returned properly authenticated and certified under letters rogatory, properly issued and returned, is admissible in evidence on behalf of the United States.²⁸

§ 144. Same—Same—Object of the constitutional provision—Cross-examination—Ground of exception to the rule.—As shown by authorities cited in the section next preceding, there are three exceptions to the constitutional rule giving the accused the right to be confronted with the witnesses against him, namely: (1) The admission of dying declarations; (2) the admission of the statement or deposition of a witness made under oath, but who is absent from the trial by the wrongful procurement of the accused; and (3) the admission of the testimony of a witness given under oath before the jury in a former trial, and who is, at the time of the subsequent trial, deceased. The ground of the third exception to the rule is that: the right of the accused to cross-examine the witness

²⁶ *Reynolds v. United States*, 98 U. S. 145, 159 (25:244).

²⁸ *United States v. Zucker*, 161 U. S. 475, 482 (40:777).

²⁷ *Mattox v. United States*, 156 U. S. 237, 261 (39:409).

having once been exercised by the accused, it is no hardship upon him to allow the testimony of the deceased witness to be read to the jury.²⁹ The primary object of the constitutional provision is to prevent the use of depositions and *ex parte* statements against the accused, instead of a personal examination and cross-examination of the witness, in which the accused has an opportunity to test his recollection and to sift his conscience, and also to compel him to stand face to face with the jury, in order that they may look at him, and judging by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief; but the constitutional provision must be interpreted in the light of the law as it existed at the time of its adoption, and, being so interpreted, considerations of public policy, and the necessities of the case, have been universally considered by the courts in this country and in England, both before and since the adoption of the constitution, as just and reasonable grounds for the exceptions above indicated to the constitutional rule.³⁰

§ 145. Same—Right of accused to compulsory process for witnesses and assistance of counsel.—A criminal trial, and especially in a capital case, without compulsory process for the witnesses in favor of the accused, and without allowing him to make his full defense by counsel learned in the law, is a cruel mockery of justice; and this strange defect of the com-

²⁹ *Rex v. Jolliffe*, 4 Term Rep. 285, 290; *Rex v. Smith*, 2 Stark. 208; *Rex v. Radbourne*, 1 Leach C. C. 512; *Buckworth's Case*, Raym. 170; *Kendrick v. State*, 10 Humph. 479; *Commonwealth v. Richards*, 18 Pick. 434; S. C. 29 Am. Dec. 608; *United States v. Macomb*, 5 McLean, 286; *Summons v. State*, 5 Ohio St. 325; *Brown v. Commonwealth*, 73 Pa. 321; S. C. 13 Am. Rep. 740; *State v. McO'Blenis*, 24 Mo. 402; S. C. 69 Am. Dec. 435; *State v. Baker*, 24 Mo. 437; *State v. Houser*, 26 Mo. 431; *State v. Able*, 65 Mo. 357; *Owens v. State*, 63 Miss. 450; *Barnet v. People*, 54 Ill. 325; *United States v. White*, 5 Cranch C. C.

457; *Robinson v. State*, 68 Ga. 833; *State v. Wilson*, 24 Kan. 189; S. C. 36 Am. Rep. 257; *State v. Johnson*, 12 Nev. 121; *Roberts v. State*, 68 Ala. 515; *State v. Cook*, 23 La. Ann. 347; *Dunlap v. State*, 9 Texas App. 179; S. C. 35 Am. Rep. 736; *O'Brien v. Commonwealth*, 6 Bush. 564; *State v. Hooker*, 17 Vt. 658; *Carey v. Sprague*, 12 Wend. 41; S. C. 27 Am. Dec. 110; *United States v. Wood*, 3 Wash. C. C. 440; *State v. Valentine*, 29 N. C. 225; *Mattox v. United States*, 156 U. S. 237, 261 (39:409).

³⁰ *Mattox v. United States*, 156 U. S. 237, 261 (39:409).

mon law, which stood so long as a reproach upon criminal procedure in England³¹ was remedied and provided against by the sixth amendment to the constitution, and an act of the first congress, passed at its second session, entitled "an act for the punishment of certain crimes against the United States."³² The intent and spirit of the constitutional guaranty and the statute have been faithfully adhered to by the judges and courts of the United States, except that an occasional tendency is seen to appoint, for the defense of capital crimes, very young members of the bar, who, although worthy members of the profession, do not possess that experience, learning and skill in the profession which are requisite in such cases. The accused in such cases "shall be allowed and admitted to make his full defense by counsel learned in the law."

§ 146. Punishment—Cruel and unusual not to be inflicted.—The eighth amendment to the constitution declares that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision was taken from the English "act of settlement," in which, after reciting various grounds of grievances, and, among them, that excessive bail had been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects, and that excessive fines had been imposed, and illegal and cruel punishments had been inflicted, it is declared "that excessive bail ought not to be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted." This declaration of rights had reference to the acts of the executive and judicial departments of the government, and was intended as a restraint upon them.³³ At common law neither the mode of executing a prisoner nor the time or place of execution was necessarily embodied in the sentence; directions in regard to the mode of execution were usually given by the judge in the calendar of capital cases prepared by the clerk at the close of the term, and these directions constituted in many cases the only authority of the officer as to the mode of execution, and they were often attended with

³¹ Ante secs. 1-10.

29, p. 118; U. S. Rev. Stat. sec. 1034.

³² U. S. Const. VI art. of Amndt.;

1 U. S. Stat. at L. chap. IX, sec.

³³ Ex parte Kemmler, 136 U. S. 436, 449 (34:519).

the greatest atrocities and cruelties.³⁴ Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution.³⁵

§ 147. Same—Same—Cumulative penalties imposed on habitual criminals.—A statute which imposes increased, cumulative or aggravated penalties upon conviction of a crime of a person, because of his having been previously convicted of a crime or crimes, is not violative of the eighth amendment. Such statutes are aimed at habitual criminals; the punishment is for the new crime only; but is made heavier because the accused is an habitual criminal.³⁶

§ 148. No person twice in jeopardy for same offense—Meaning of the prohibition.—The fifth amendment declares: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction of the offense is, of course, like all proceedings in the case, absolutely null and void, and therefore no bar to a subsequent indictment and trial in a court which has jurisdiction of the offense.³⁷ But although an indictment be fatally defective, yet, if the court have jurisdiction of the cause and of the party accused, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he cannot be discharged by writ of habeas corpus.³⁸

§ 149. Same—Acquittal upon defective indictment—Common-law rule.—In England, by the rule of the common law, an acquittal upon an indictment so defective that, if it had

³⁴ *Wilkerson v. People of the United States in Utah*, 99 U. S. 130, 137 (25:345).

³⁵ *Ex parte Kemmler*, 136 U. S. 436, 449 (34:519).

³⁶ *McDonald v. Massachusetts*, 180 U. S. 311, 313 (45:542) and note.

³⁷ *Commonwealth v. Peters*, 12 Met. 382; 2 Hawk. P. C. chap. 35, sec. 3; 1 Bishop Crim. Law, sec. 1020; *Ball v. United States*, 163 U. S. 662, 674 (41:300).

³⁸ *Ex parte Park*, 93 U. S. 18, 24 (23:787); *Ball v. United States*, 163 U. S. 662, 674 (41:300).

been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as sufficient to support a plea of former acquittal.³⁹

§ 150.—Same—Same—Rule as to acquittal upon defective indictment in the federal courts.—The supreme court of the United States has adopted the English rule as to the effect of an acquittal upon a defective indictment, and has accordingly held, that a general verdict of acquittal found by the jury upon the issue of not guilty to an indictment which undertakes to charge murder and not objected to before the verdict as insufficient on account of a failure to charge some of the essential elements of the offense, is a bar to a second indictment for the same killing, although before the trial on the second indictment the first indictment has been held fatally defective on a writ of error prosecuted by defendants jointly indicted in the first indictment with the defendant who was so acquitted.⁴⁰

§ 151. Same—The verdict constitutes the bar.—It is the verdict of acquittal found by the jury, and not the judgment entered thereon by the court, which constitutes the bar to a subsequent prosecution. When such a verdict has been duly returned and received by the court, the court can take no other action than to order the discharge of the defendant; the verdict of acquittal is final and cannot be reviewed on writ of error or otherwise, without putting the accused twice in jeopardy, and thereby violating the constitution; the verdict of acquittal, although not followed by any judgment of the court, is an effectual bar to a subsequent prosecution for the same offense.⁴¹

§ 152. Same—When defendant procures verdict of conviction set aside.—A defendant who has been convicted, and who

³⁹ 2 Hale, P. C. 248, 394; 2 Hawk. P. C. chap. 35, sec. 1; 1 Stark. Crim. Pl. (2nd Ed.) 320; 1 Chitty, Crim. Law, 458; Archb. Crim. Pl. & Ev. (19th Ed.) 143; Russell, Crimes (6th Ed.), 48; Ball v. United States, 163 U. S. 662, 674 (40:300).

⁴⁰ Ball v. United States, 163 U. S. 662, 674 (40:300).

⁴¹ Ball v. United States, 163 U. S. 662, 674 (40:300); United States v. Sanges, 144 U. S. 310 (36:446); Commonwealth v. Tucker, 20 Pick. 356, 365; West v. State, 22 N. J. L. 212, 231; 1 Lead. Crim. Cas. (2nd Ed.) 532.

procures the verdict and judgment against him, upon an indictment, to be set aside, may be tried anew upon the same indictment, or upon another indictment for the same offense of which he has been convicted. When the defendant, after trial, conviction and judgment, sues out a writ of error to have the judgment and sentence against him reviewed, and, upon such review, the judgment and sentence are reversed, and the indictment ordered to be quashed and dismissed, the former conviction cannot be pleaded in bar of the second prosecution.⁴²

§ 153. **Same—Several counts in the indictment—Nolle prosequi as to some counts—No finding as to others.**—“It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proof.”⁴³ Where there are several counts in the indictment, and a *nolle prosequi* is entered as to some of them, that works no acquittal, but leaves the prosecution just as though no such counts had ever been inserted in the indictment.⁴⁴ Where an indictment contains several counts, and the jury find the defendant guilty on all the counts but one, and the verdict is silent on that one count, and the court receives the verdict and discharges the jury without the consent of the accused, the silence of the jury is equivalent to a verdict of not guilty as to that count, and may be pleaded in bar of any further prosecution of the charge with reference to which the jury were silent.⁴⁵ Where the jury find the defendant guilty on several counts, and disagree as to other counts, and their disagreement as to such counts is formally entered upon the record, and the jury is discharged by the court, a

⁴² Ball v. United States, 163 U. S. 662, 674 (40:300); Hapt v. Utah, 120 U. S. 430 (30:708). United States, 160 U. S. 187 (40:388); Putnam v. United States, 162 U. S. 687 (40:1118).

⁴³ Dealy v. United States, 152 U. S. 539, 547 (38:545); 1 Bishop, Crim. Proc. sec. 422; Selvester v. United States, 170 U. S. 262, 271 (42:1029); Claasen's Case, 142 U. S. 140 (35:966); Ballew v. United States, 152 U. S. 539, 547 (38:545).
⁴⁴ Dealy v. United States, 152 U. S. 539, 547 (38:545).
⁴⁵ Dealy v. United States, 152 U. S. 539, 547 (38:545); Selvester v. United States, 170 U. S. 262, 271 (42:1029).

subsequent prosecution for the offenses as to which the jury disagreed and on account of which it was regularly discharged would not constitute a second jeopardy.⁴⁶

§ 154. Same—Disagreement of the jury—Discharge for bias, disqualification or corruption.—Courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and the defendant is not thereby twice put in jeopardy within the meaning of the fifth amendment to the constitution.⁴⁷ Whether there is a manifest necessity for the discharge of the jury in order to prevent a defeat of the ends of public justice is a question to be finally decided by the presiding judge in the sound exercise of his discretion, taking all the circumstances of the case into consideration.⁴⁸ This power of the court may be exercised where the jury are unable to agree;⁴⁹ or, when the trial is proceeding, the jury having been sworn and a witness examined, the fact that one of the jury is disqualified by having been a member of the grand jury that found the indictment, becomes known to the court;⁵⁰ or when, during the progress of the trial, and after the jury have been empanelled and sworn, and witnesses have been examined, it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors, or any of them, are subject to such bias or prejudice as not to stand impartial between the government and the accused.⁵¹

⁴⁶ *Selvester v. United States*, 170 U. S. 262, 271 (42:1029); *Putnam v. United States*, 162 U. S. 687 (40:1118).

⁴⁷ *Thompson v. United States*, 155 U. S. 271, 283 (39:146); *United States v. Perez*, 9 Wheat. 579 (6:165); *Simmons v. United States*, 142 U. S. 148 (35:968); *Logan v. United States*, 144 U. S. 263 (36:429); *Ex parte Lange*, 18 Wall. 201 (21:887).

⁴⁸ *Logan v. United States*, 144 U. S. 263 (36:429); *United States v. Perez*, 9 Wheat. 579 (6:165); *Simmons v. United States*, 142 U. S. 148 (35:968).

⁴⁹ *Logan v. United States*, 144 U. S. 263 (36:429); *United States v. Perez*, 9 Wheat. 579 (6:165).

⁵⁰ *Thompson v. United States*, 155 U. S. 271, 283 (39:146).

⁵¹ *Simmons v. United States*, 142 U. S. 148 (35:968). In the lead-

§ 155. Ex post facto laws—Inhibition applies only to legislation concerning crimes.—There is a constitutional inhibition upon both the federal⁵² and state⁵³ governments, against the passing of *ex post facto* laws. Such laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively. The debates in the constitutional convention, upon this provision of the constitution, show that the phrase *ex post*

ing case in America on this subject, the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner or of the attorney for the United States; the prisoner's counsel, thereupon, claimed his discharge as of right, and, there being a division in the opinions of the judges, the question was certified to the supreme court, in answering which that court, speaking by Justice Story, said: "The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration,

there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." *United States v. Perez*, supra.

⁵² U. S. Const. art. I, sec. 9, cl. 3.

⁵³ U. S. Const. art. I, sec. 10.

facto laws was understood in a restricted sense, relating to criminal cases only, and the description of Blackstone of such laws was referred to for their meaning. This signification was adopted in the supreme court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. The same words are used in the constitutions of many of the states, and in the opinions of their courts, and by writers upon public law, and are uniformly understood in this restricted sense.⁵⁴

§ 156. **Same—Reason for the constitutional inhibition.**—The provision of the constitution inhibiting the passing of *ex post facto* laws, like many other guaranties of that instrument, originated in the settled purpose and policy of the founders of the government to secure the people of this country from the invasions of the individual rights of life, liberty and property which had been so frequent in the judicial and constitutional history of England. It was prompted by the memory of that long debauch of parliamentary and judicial crimes in that country, which must ever shock the moral sense of mankind. The inhibition had its origin in a knowledge of the fact that the parliament of Great Britain had claimed and exercised the power to pass *ex post facto* laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the latter lesser punishment. Those acts were legislative judgments, and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason, which were not treason when committed; at other times, they violated the established rules of evidence, in order to supply a deficiency of legal proof, by admitting as sufficient for conviction one witness, when the existing law required two, or by receiving depositions and *ex parte* affidavits, or evidence without oath, by allowing the wife to testify against the husband, or by receiving other illegal testimony which the courts of justice would not admit; at other times, they inflicted punishments, where the party was not, by law, liable to any punishments; and in other cases they inflicted

⁵⁴ *Watson v. Mercer*, 8 Pet. 88 How. 395 (13:469); *Carpenter v. (8:876)*; *Locke v. New Orleans, Pennsylvania*, 17 How. 456 4 Wall. 172 (18:334); *Calder v. (15:127)*; *Re Sawyer*, 124 U. S. Bull, 3 Dall. 386 (1:648); *Balti- 200 (31:402).*
more & S. R. R. Co. v. Nesbit, 10

greater punishment than the law annexed to the offense. The ground relied on for the exercise of such legislative power was the plea, that the safety of the kingdom demanded the death, or other punishment of the offender; and with but few exceptions, the advocates of such laws were stimulated by personal ambition or resentment and vindictive malice. To prevent such and similar acts of violence and injustice, and to secure to every person charged with crime a fair and impartial trial, according to known, certain and fixed rules of law, evidence and procedure, antecedently established, this constitutional inhibition was imposed upon both state and federal governments.⁵⁵

§ 157. **Same—Defined.**—An *ex post facto* law within the meaning of the constitution may be defined as follows: (1) A law which, in its operation, makes that criminal which was not so at the time the action was performed; or (2) which aggravates the crime or makes it greater than it was when committed; or (3) which changes the punishment and inflicts a greater punishment than was annexed to the crime when committed, or which, in relation to the offense or its consequences, alters the situation of a party to his advantage; or (4) which alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender;⁵⁶ or (5) which takes away from the accused, what, by the law when the crime was committed, was a good defense to the crime charged.⁵⁷ A provision in a state constitution, denying to a person charged with the crime of murder in the first degree, the benefit of the state law as it was at the time of the commission of the crime, under and by virtue of which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction be subsequently reversed, is held by the supreme court to be in conflict with the constitutional inhibition; the decision proceeding upon the ground that such a provision in a state constitution deprives the accused of a substantial

⁵⁵ *Calder v. Bull*, 3 Dall. 386 (1:648).

⁵⁶ *Calder v. Bull*, 3 Dall. 386 (1:648).

⁵⁷ *United States v. Hall*, 2 Wash. 366, Fed. Cas. 15285; *Kring v. Missouri*, 107 U. S. 221, 251 (27:506).

right which the law gave him when the offense was committed, and, therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offense was committed, the accused could not have been convicted of murder in the first degree after his conviction of murder in the second degree; whereas, by the abrogation of that law by a constitutional provision subsequently adopted, if such abrogation should be held valid as to his crime, he could thereafter be tried and convicted of murder in the first degree, and punished accordingly; and thus the judgment of conviction of murder in the second degree would be deprived of all force as evidence to establish his immunity thereafter from punishment for murder in the first degree. Such a proceeding has been held to be a deprivation of a substantial right which the accused had at the time the alleged offense was committed.⁵⁸

§ 158. **Same—Change in the law of procedure.**—The inhibition upon the passage of *ex post facto* laws does not give a person charged with crime a right to be tried in all respects, by the law in force when the crime charged was committed. The mode of trials is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.⁵⁹ A change in the law as to the qualification of jurors,⁶⁰ or the competency of witnesses, permitting the crime charged to be established by witnesses who by the law at the time the offense was committed were incompetent to testify in any case whatever, is not within the constitutional inhibition.⁶¹ But the legislature cannot, under the guise of regulating procedure, deprive a person accused of crime of any substantial right which the law secured to him at the time the crime was committed; for a law which is one of procedure may be obnoxious as an *ex post facto* law.⁶²

⁵⁸ Kring v. Missouri, 107 U. S. 221 (27:506); Hapt v. Utah, 110 U. S. 574, 590 (28:262).

⁵⁹ Gibson v. Mississippi, 162 U. S. 565, 592 (40:1075); Hapt v. Utah, 110 U. S. 574, 589 (28:262).

⁶⁰ Gibson v. Mississippi, 162 U. S. 565, 592 (40:1075).

⁶¹ Hapt v. Utah, 110 U. S. 574, 598 (28:262).

⁶² Kring v. Missouri, 107 U. S. 221, 251 (27:506).

- § 159. **Same—Legislative acts valid as to one class of cases and void as to another class.**—A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control.⁶³

§ 160. **Same—Illustrations.**—The provisions of the constitution of Missouri, adopted immediately after the civil war, imposing a test oath as a condition of following certain professions,⁶⁴ and the acts of congress imposing a test oath as a condition of practicing as attorneys and counsellors in the courts of the United States,⁶⁵ were obnoxious to the constitutional inhibition against the passing of *ex post facto* laws. And so a legislative enactment by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment, is an *ex post facto* law.⁶⁶ A statute which requires the warrant issued for the execution of a capital sentence to appoint and designate a week of time within which such sentence must be executed, and which gives to the warden of the prison power to fix the particular day and hour for the execution of the sentence within the week specified, and requires that the time so fixed for the execution shall be by him kept secret, and in no manner divulged except privately, and to a limited number of persons is *ex post facto* as to crimes previously committed, the mental anxiety resulting from the secrecy and the power in the warden to fix the time of execution being an increase and aggravation of the offender's punishment.⁶⁷ A statute changing the law so as to impose solitary confinement on a convicted felon while awaiting execution, is, as to offenses previously committed, *ex post facto*, because it imposes an additional pun-

⁶³ Jaehne v. People of New York, 128 U. S. 189 (32:398); Bit-
tenhaus v. Johnston, 92 Wis. 594,
66 N. W. 806, 32 L. R. A. 381.

⁶⁴ Cummings v. Missouri, 4
Wall. 277, 332 (18:356).

⁶⁵ Ex parte Garland, 4 Wall. 333,
399 (18:366).

⁶⁶ Fletcher v. Peck, 6 Cranch, 87
(3:162).

⁶⁷ Ex parte Medley, 134 U. S.
160, 176 (33:835).

ishment.⁶⁸ A statute which makes it a misdemeanor to attempt to practice medicine after conviction of a felony, is within the police power of the state, and is not unconstitutional, even when applied to a person who was convicted of a felony before the passage of the act.⁶⁹ The provision of the constitution of Utah, providing for trial by a jury of eight persons instead of twelve, as previously, in courts of general jurisdiction, is, when applied to a felony committed within the limits of the state while it was a territory, within the inhibition against *ex post facto* laws;⁷⁰ but a statute providing that persons selected for jury service shall possess good intelligence, sound judgment, and fair character, is, when applied to a capital felony committed before its passage, a legitimate exercise of legislative power.⁷¹ A statute providing that, comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute, is not, as to crimes committed before its passage, an *ex post facto* law.⁷² A statute which confers upon the state in a criminal case the right of appeal from a judgment granting the defendant a new trial, which was enacted after the commission of the offense, and after the trial, but before the trial court had granted a new trial, is not within the inhibition against the passage of *ex post facto* laws.⁷³

§ 161. Same—Statutes mitigating punishment—What is a mitigation—New York rule.—The justice delivering the opinion in the leading case said, upon this point: “But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction.”⁷⁴

⁶⁸ *Ex parte Medley*, 134 U. S. 160, 176 (33:835).

⁶⁹ *Hawker v. State of New York*, 170 U. S. 189, 205 (42:1002).

⁷⁰ *Thompson v. Utah*, 170 U. S. 343, 355 (42:1061).

⁷¹ *Gibson v. Mississippi*, 162 U. S. 565 (40:1075).

⁷² *Thompson v. Missouri*, 171 U. S. 380, 388 (43:204).

⁷³ *Mallett v. North Carolina*, 181 U. S. 589, 601 (45:1015).

⁷⁴ *Calder v. Bull*, 3 Dall. 386 (1:648).

There has been some want of harmony in the decisions as to what is a mitigation of punishment,⁷⁵ but the courts of New York have adopted a rule which seems reasonable, namely: (1) It would be competent for the legislature, by a general law, to remit any separable part of the punishment; and (2) any changes which should be referable to prison discipline, or penal administration, as its primary object, such as changes in the manner and kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like, may be made to take effect upon past as well as upon future offenses, although such changes might operate to either increase or mitigate the severity of the punishment after conviction.⁷⁶ "An act plainly mitigating the punishment of an offense is not *ex post facto*; on the contrary, it is an act of clemency. A law which changes the punishment of an offense from death to imprisonment for life, is a law mitigating the punishment, and, therefore, not *ex post facto*."⁷⁷

§ 162. **Same—When accused discharged**—When the new law is found to be *ex post facto*, and that law wholly repeals and displaces the law in force at the time the crime was committed, and there is no saving as to past offenses, the accused cannot be punished at all, but must be wholly discharged.⁷⁸

§ 163. **Constitutional right of trial by jury in civil cases at law**.—In the federal judicial system, the distinction between common law and equity, as it existed in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts;⁷⁹ and the seventh amendment to the constitution declares that,

⁷⁵ State v. Arlin, 39 N. H. 179; Strong v. State, 1 Blackf. 193; Heber v. State, 7 Tex. 69; Lynn v. State, 84 Md. 78, 35 Atl. 22; Hartung v. People, 22 N. Y. 104, 25 N. Y. 406, 26 N. Y. 167, 28 N. Y. 410.

⁷⁶ Hartung v. People, 22 N. Y. 1041, 25 N. Y. 406, 26 N. Y. 167, 28 N. Y. 410; Ratzky v. People 29 N. Y. 124; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572.

⁷⁷ Chief Justice Shaw in Commonwealth v. Wyman, 12 Cush.

237; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572.

⁷⁸ Re Medley, 134 U. S. 160 (33:835); Hartung v. People, 22 N. Y. 105, 25 N. Y. 406, 26 N. Y. 167, 28 N. Y. 410.

⁷⁹ U. S. Const. art. III, sec. 2; Ex parte Sawyer, 124 U. S. 200, 225 (31:402); Fenn v. Holme, 21 How. 481, 487 (16:198); Thompson v. Central Ohio R. R. Co., 6 Wall. 134 (18:765); Heine v. Levee Commrs., 19 Wall. 655 (22:223); Robinson v. Campbell, 3 Wheat.

“in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”

§ 164. **Same—Meaning of the phrases “cases in law” and “suits at common law.”**—The phrases “suits at common law,” contained in the seventh amendment, and “cases in law,” contained in the constitution as originally adopted,⁸⁰ have the same signification, and mean not merely suits which the common law recognizes among its old and settled remedies, but they embrace all suits for the determination and settlement of legal rights whatever may be their peculiar form, and which are not of equity and admiralty jurisdiction.⁸¹

§ 165. **Same—Trial by jury defined.**—Trial by jury, in civil cases, in the courts of the United States, and within the meaning of the federal constitution, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them, and to the witnesses, and to the constable in charge, and to enter judgment on their verdict, and issue execution; but it is a trial by a jury of twelve men, in the presence and under the superintendence of, and presided over by a judge, with power not only to rule upon the admissibility of evidence, but also to instruct the jury upon the law applicable to the case, and, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, calling their attention to parts of it which he thinks important, and even giving them his opinion on questions of fact, provided only he submit those questions to their determination; and with power in the presiding judge to set aside the verdict of the jury and grant a new trial, if in his opinion and discretion, the due and proper administration of justice requires it. The jury trial secured by the constitution is a common law jury trial. The constitution secures a trial by jury, without defining what that trial is, and we are

221; *Parsons v. Bedford*, 3 Pet. 446, 447; *Strocher v. Lucas*, 6 Pet. 768, 769; *Bennett v. Butterworth*, 11 How. 669; *Fitts v. McGhee*, 172 U. S. 516, 533 (43:535).

⁸⁰ U. S. Const. art. III, sec. 2.

⁸¹ *Parsons v. Bedford*, 3 Pet. 433 (7:732); *Parish v. Ellis*, 16 Pet. 454 (10:1029); *Hipp v. Babin*, 19 How. 278 (15:635); *Root v. Railway Co.*, 105 U. S. 206 (26:981).

left to the common law to learn what it is that is secured. At the time of the adoption of the constitution, and for generations before, both in England and in the colonies, a trial by jury was a trial of an issue or issues of fact by a jury of twelve men, in a superior court of common law, under the direction and superintendence of the court, and this direction and superintendence, including the power to set aside the verdict of the jury and grant a new trial, was an essential part of the trial, and in the federal courts, each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as they existed and were understood when the constitution was adopted.⁸²

§ 166. Same—Not to be defeated by blending legal and equitable demands.—The right of trial by jury in actions at law in the courts of the United States is fundamental, and cannot be defeated by indirection or circumvention; and, although, under the dual system of government created by the constitution, a large part of the functions of the federal courts are to administer state laws between competent parties, and those courts follow the state procedure in actions at law, yet, nevertheless, no state legislation establishing procedure and blending legal and equitable remedies will be followed in the federal courts to the extent of defeating a trial by jury on legal causes of action.⁸³

§ 167. Same—Philippine Islands.—The constitutional guaranty of trial by jury has not been extended to the Philippine Islands.⁸⁴ In the case cited, the court reached the following conclusions, here stated in the words of the court, namely:

“(1) That while the Philippine Islands constitute territory which has been acquired by, and belongs to, the United States, there is a difference between such territory and the territories

⁸² *Capital Traction Co. v. Hof*, 174 U. S. 1, 46 (43:873); *United States v. Philadelphia & Reading Railroad Co.*, 123 U. S. 113, 114 (31:138); *Sarf v. United States*, 156 U. S. 51, 106 (39:343); *Thompson v. Utah*, 170 U. S. 343, 350 (42:1061); *Vicksburg & M. Railroad Co. v. Putnam*, 118 U. S. 545,

553 (30:257); *United States v. 1363 Bags Merchandise*, 2 Sprague, 85, 88.

⁸³ *Scott v. Neely*, 140 U. S. 106, 117 (35:358); *Cates v. Allen*, 149 U. S. 458 (37:808).

⁸⁴ *United States v. Dorr*, 190 U. S. Appendix I (47:1187).

which are a part of the United States, with reference to the constitution of the United States.

“(2) That the constitution was not extended here by the terms of the treaty of Paris, under which the Philippine Islands were acquired from Spain. By the treaty the status of the ceded territory was to be determined by congress.

“(3) That the mere act of cession of the Philippines to the United States did not extend the constitution here, except such parts as fall within the general principles of fundamental limitations in favor of personal rights, formulated in the constitution and its amendments, and which exist rather by inference and the general spirit of the constitution, and except those express provisions of the constitution which prohibit congress from passing laws in their contravention under any circumstances; that the provisions contained in the constitution relating to jury trials do not fall within either of these exceptions, and consequently the right to trial by jury has not been extended here by the mere act of the cession of the territory.

“(4) That congress has passed no law extending here the provisions of the constitution relating to jury trials, nor were any laws in existence in the Philippine Islands at the date of their cession for trials by jury, and consequently there is no law in the Philippine Islands entitling the defendants in this case to such trial; that the court of first instance committed no error in overruling their application for a trial by jury.”⁸⁵

§ 168. **Same—Not applicable to court of claims.**—The act of congress which invests the court of claims with power to render judgment in favor of the United States against a claimant, upon any set-off, counter-claim, claim for damages, or other demand, is not in contravention of the constitutional guaranty of trial by jury; for the reason that suits against the government in the court of claims whether reference be had to the claimant's demand, or to the defense, or to any set-off, or counter-claim which the government may assert, are not suits at common law within the true meaning of the constitution. The government cannot be sued except with its own consent. It can declare in what court it may be sued, and prescribe the

⁸⁵ United States v. Dorr, *supra*. And see also Downes v. Bedwell, 182 U. S. 244, 391 (45:1088).

forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. The act of congress informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted to him, he must do so subject to the conditions annexed by the government to the exercise of the privilege.⁸⁶

§ 169. Fact tried by jury not re-examined otherwise than according to the rules of the common law.—The seventh amendment to the constitution declares: “And no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.” The only modes known to the common law for the re-examination of facts tried by a jury are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceeding. The rule applies to facts tried by a jury in both the federal courts and the state courts, and the record must be removed by writ of error, and not by appeal.⁸⁷ Story, Justice, in a case in the circuit court, after quoting the words of the seventh amendment, said: “Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. Now, according to the rules of the common

⁸⁶ *McElrath v. United States*, 102 U. S. 426, 441 (26:189).

⁸⁷ *Parsons v. Bedford*, 3 Pet. 433 (7:732); *Barreda v. Silsbee*, 21 How. 146, 166 (16:86); *Justice v. Murray*, 9 Wall. 274, 277 (19:658); *Miller v. Life Ins. Co.*, 12 Wall. 285, 300 (20:398); *Ins. Co. v. Comstock*, 16 Wall. 258, 269 (21:493);

Ins. Co. v. Folsom, 18 Wall. 237, 249 (21:827); *Railroad Co. v. Frazar*, 100 U. S. 24, 31 (25:531); *Lincoln v. Power*, 151 U. S. 436, 438 (38:224); *Railroad Co. v. Chicago*, 166 U. S. 226, 246 (41:979); *Capital Traction Co. v. Hof*, 174 U. S. 1, 46 (43:373).

law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a *venire facias de novo* is awarded. This is the invariable usage, settled by the decisions of ages.”⁸⁸

§ 170. **Same—Doctrine stated by Justice Gray.**—The doctrine on this subject has been stated by Gray, Justice, of the United States supreme court, as follows:

“It must therefore be taken as established, by virtue of the seventh amendment to the constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by a jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial was had in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.”⁸⁹

§ 171. **Same—Facts tried by jury in bankruptcy proceedings reviewable on writ of error only.**—A final judgment of a United States district court, sitting in bankruptcy, rendered upon a verdict of not guilty of a jury, under the provision of the Bankrupt Act now in force, can be reviewed on writ of error only. The proceedings in administration of bankrupt estates are equitable in their nature; but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law; and, this

⁸⁸ United States v. Wonson, 1 Gall. 14, Fed. Cas. 16,750.

⁸⁹ Capital Traction Co. v. Hof, 174 U. S. 1, 46 (43:873).

being so, judgments rendered in such cases are revisable only on writ of error.⁹⁰

§ 172. **Eminent domain.**—The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government; it is an incident of sovereignty, and requires no constitutional recognition, and the provision contained in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is merely a limitation upon the use and exercise of the power.⁹¹ The right of eminent domain is vested in the federal government, and may be exercised within the states, and without their consent, so far as is necessary to execute the powers of government vested in it by the federal constitution;⁹² and whenever it becomes necessary for the accomplishment of any object within the authority of congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, congress may exercise the right with or without a concurrent act of the state in which the land lies.⁹³ While the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted, and the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.⁹⁴ . . .

§ 173. **Same—Public use.**—When the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.⁹⁵ While great latitude is given the legislature, the purpose must be, *bona fide*, a public one, and

⁹⁰ *Elliott & Co. v. Toeppner*, 187 U. S. 327, 335 (47:200); *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258 (21:493).

⁹¹ *United States v. Jones*, 109 U. S. 513, 521 (27:1015); *Boom Co. v. Patterson*, 98 U. S. 406 (25:208).

⁹² *Kohl v. United States*, 91 U. S. 367, 379 (23:449); *United States*

v. Gettysburg Electric R. Co., 160 U. S. 668 (40:576).

⁹³ *Luxton v. North River Bridge Co.*, 153 U. S. 525, 534 (38:808); *Van Brocklin v. Anderson*, 117 U. S. 151, 154 (29:845).

⁹⁴ *Shoemaker v. United States*, 147 U. S. 282, 322 (37:170).

⁹⁵ *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 686 (40:576).

not a mere colorable device for the purpose of taking the property of one citizen for the benefit of another.⁹⁶

§ 174. **Same—What is a taking.**—Where the government, in improving the navigation of a navigable stream, by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the meaning and scope of the fifth amendment to the constitution. While the government does not directly proceed to appropriate the title, yet, it takes away the use and value; when that is done, it is of little consequence in whom the fee may be invested. The proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto, pass to the government and it becomes henceforth the full owner.⁹⁷ There is a distinction between the taking of property for public use and a consequential injury to such property, by reason of some public work; and it has been held that the destruction of access to land abutting on a navigable river, by the construction, by congress, of a pier on the submerged lands in front of the upland, was not a taking of private property, but only an instance of consequential injury to the property of the riparian owner.⁹⁸ Where, by the construction of a dyke, by the United States in the improvement of the Ohio river, the plaintiff, a riparian owner, was through the greater part of the gardening season deprived of the use of her landing for the shipment of farm products and supplies to her farm, whereby the value of her farm was greatly diminished, it was held that there was no taking of the property, but only a consequential injury.⁹⁹ It was a rule of the common law, that persons appointed or authorized by law to make or improve a public highway are not responsible for consequential damages, if they act within their jurisdiction, and with care and skill. And acts done in the proper exercise of governmental powers, and not directly en-

⁹⁶ *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U. S. 254, 282 (35:1004).

⁹⁷ *United States v. Lynah*, 188 U. S. 445, 485 (47:539).

⁹⁸ *Scranton v. Wheeler*, 179 U. S. 141, 153 (45:126).

⁹⁹ *Gibson v. United States*, 166 U. S. 269 (41:996).

croaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision, and do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action.¹ But some of the states have adopted a constitutional provision, declaring that "private property shall not be taken or damaged for public use without just compensation," and it has been held that the introduction of the additional words into the constitutional provision, has given to property holders a greater security; and that under such a constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character—that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owners real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover.²

§ 175. Same—Mode of procedure in exercising the power.—In the absence of any provision in the organic law prescribing a contrary course, the mode of exercising the right of eminent domain is in the discretion of the legislature.³ Under the general grant of jurisdiction, the circuit courts of the United States have jurisdiction of a proceeding brought by the United States to acquire, by eminent domain, land for a custom-house.⁴ A proceeding for condemnation in the circuit court of the United States, under the act⁵ of congress controlling such proceedings, is in substance and effect an action at law, and the jury trial in such proceedings is the same as the ordinary jury trial in a court of record.⁶

§ 176. Same—Compensation.—The "just compensation" made for private property taken for public use, must, under

¹ Northern Transportation Co. v. Chicago, 99 U. S. 635, 641 (25:336); Smith v. Corporation of Washington, 20 How. 135 (15:858).

² Chicago v. Taylor, 125 U. S. 161, 170 (31:638).

³ Secombe v. Milwaukee & St. P. Ry. Co., 23 Wall. 108, 119 (23:67).

⁴ Kohl v. United States, 91 U. S. 367, 379 (23:449).

⁵ 25 U. S. Stat. at L. 357.

⁶ Kohl v. United States, 91 U. S. 367, 397 (23:449).

the provision relating thereto, contained in the fifth amendment to the constitution, be a full and exact equivalent for the property taken; and this excludes the taking into account as an element of compensation any supposed benefit that the owner may receive in common with all the community from the public use to which his private property is appropriated.⁷ Where lands are condemned for the use of the United States, the government discharges its entire duty to the owners of the property by the payment of the amount awarded by the commissioners, as compensation, into court, pursuant to its order.⁸

§ 177. *Writ of habeas corpus*.—Hallam in his constitutional history says: "It cannot be too frequently repeated, that no power of arbitrary detention has ever been known to our constitution since the charter obtained at Runnymede. The writ of *habeas corpus* has always been a matter of right. But, as may naturally be imagined, no right of the subject, in his relation to the crown, was preserved with greater difficulty. Not only the privy-council in general arrogated to itself a power of discretionary imprisonment, into which no inferior court was to inquire, but commitments by a single counselor appear to have been frequent. These abuses gave rise to a remarkable complaint of the judges, which, though an authentic recognition of the privilege of personal freedom against such irregular and oppressive acts of individual ministers, must be admitted to leave by far too great latitude to the executive government, and to surrender, at least by implication from rather obscure language, a great part of the liberties which many statutes had confirmed."⁹ The founders of our government led by the light of the history¹⁰ of the aggressions of the English executive upon the liberties of the citizen, declared in the constitution that: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."¹¹ The power to suspend the privilege of the writ is vested in congress;¹² that body has as-

⁷ *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 345 (37:463).

⁸ *United States v. Dunnington*, 146 U. S. 338, 354 (36:996).

⁹ Hallam's *Const. Hist. England*, 139, 140.

¹⁰ *Ex parte Milligan*, 4 Wall. 2, 142 (18:281).

¹¹ U. S. Const. art. I, sec. 9, cl. 2.

¹² *Ex parte Bollman and Ex parte Swartout*, 4 Cranch, 96 (2:561); *Ex parte John Merryman*, Taney 246, Fed. Cas. No.

serted the power by once actually exercising it.¹³ The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.¹⁴

9,487; 3 Story's Com. on the Constitution, sec. 1336.

¹³ *Ex parte Milligan*, 4 Wall. 2,

142 (18:281); 12 U. S. Stat. at L. 755.

¹⁴ *Ex parte Milligan*, 4 Wall. 2, 142 (18:281).

CHAPTER VI.

LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION UPON THE STATES.

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(a) THE EFFECT OF THE LATE AMENDMENTS UPON THE STATE AND FEDERAL GOVERNMENTS AND THEIR RELATIONS TOWARD EACH OTHER, AND UPON THE RELATIONS OF EACH TOWARD THE PEOPLE.

§ 178. The purposes of this chapter.—The purposes of this chapter are: (1) To state the general effect, as developed by the decisions of the supreme court, produced by the adoption of the thirteenth, fourteenth and fifteenth amendments upon the dual system of government in this country, as it had been theretofore established and settled, including the effect of those amendments upon the state and federal governments and their relations toward each other and the relations of each toward the people of the several states; (2) to develop some of the practical results reached, and rules of law established by the decisions of the supreme court construing those amendments,

as to their operation as limitations upon the states, and their influence upon individual rights; (3) to state some of the practical results reached, and rules of law established by the decisions in the construction of the provisions of the constitution, as originally adopted, imposing limitations upon the state; and (4) by this means to lay the foundation for developing, in subsequent parts of this work, the original and appellate jurisdiction of the federal judiciary in cases involving a federal question. On account of the great number and variety of novel and practical questions arising in legislation out of the late amendments, and their overshadowing importance, and for convenience of arrangement, the limitations contained in the late amendments are here considered in advance of a consideration of the limitations found in the constitution as originally adopted.

§ 179. Principles of the government as settled prior to the adoption of the late amendments.—Prior to the adoption of the thirteenth, fourteenth and fifteenth amendments to the federal constitution, the great and fundamental principles of the American system of government had been explained, defined and settled, by the decisions of the supreme court of the United States, which tribunal is, by the organic law, vested with the absolute right of decision, in the last resort, of all federal questions.¹ Before entering upon an examination of the limitations imposed upon the states by the amendments above named, it is deemed convenient, if not expedient, to state some of the principles of the government which had been settled by the adjudications prior to their adoption, as a means of facilitating their examination, and illustrating their effect upon the structure of the government. Such a method of investigation and examination will obviate the necessity of “the long progression of the thoughts to remote and first principles in every case.”² The following are some of the principles so settled by the previously decided cases:

1. The federal constitution created and established a dual government or complex polity, in which the attributes and powers of sovereignty were divided and partitioned between the federal government and the state governments. 2. The

¹ *Martin v. Hunter's Lessees*, 1 (5:252); *Ableman v. Booth*, 21 Wheat. 304, 382 (4:97); *Cohens v. How*, 506, 526 (16:169).

Virginia, 6 Wheat. 264, 443 ² *Locke, Concerning The Understanding*, 502.

attributes and powers of national sovereignty were by the constitution surrendered to, and vested in the federal government: the federal government is a government of delegated, enumerated and limited powers; but it is a national government, and, for the purposes of executing the powers confided to it by the constitution, it may legitimately control all individuals and governments within the American territory. 3. The attributes and powers of municipal sovereignty, including the police power, were, by the constitution, reserved to the states; this municipal sovereignty embraces all the powers of government not by the constitution surrendered to the federal government nor prohibited by it to the states. 4. The federal constitution, and the laws of the United States made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, are the supreme law of the land; but an act of congress which is repugnant to the constitution is absolutely null and void, and constitutes no part of the law of the land. 5. The constitution and laws of a state, when repugnant to the constitution and valid laws and treaties of the United States, are absolutely void, and may be so declared by the supreme judicial power of the federal government. 6. The federal and state governments, each, is sovereign and supreme within the sphere of governmental action assigned to it by the constitution; but when a conflict arises between the authority of the federal government and the authority of a state government, the latter must yield to the supremacy of the former, until the validity of the conflicting claims can be finally determined by the judicial power of the national government. 7. Under the federal constitution, as expounded by the supreme court, the powers of government have been classified, as follows: (1) Powers which belong exclusively to the states; (2) Powers which belong exclusively to the national government; (3) Powers which may be exercised concurrently and independently by both; and (4) Powers which may be exercised by the states, but only until congress shall see fit to act in the exercise of them, when the authority of the state retires and lies in abeyance.³ 8. The

³ *Martin v. Hunter's Lessee*, 1 Wheat. 1, 240 (6:23); *Brown v. Wheat*, 304, 382 (4:79); *Cohens v. Maryland*, 12 Wheat. 419 (6:678); *v. Virginia*, 6 Wheat. 264, 448 License Cases, 5 How. 504 (5:252); *Gibbons v. Ogden*, 9 (12:256); *New York v. Miln*, 11

first ten amendments to the federal constitution are limitations on the federal government, and impose no restraints, whatever, upon the states.⁴

§ 180. **Same—Divided sovereignty—The doctrine of Marshall, Taney and Waite.**—In a legal treatise, confessedly based in all principal matters, upon the decisions of the supreme court of the United States, we are not, in anywise, concerned with the discussions of statesmen and publicists, as to the seat of sovereignty in the American system of government, the sole purpose being to state the doctrine of the supreme court upon that subject; and it may be safely affirmed, that the court has, from the first, held, without variableness or shadow of turning, to the doctrine of a divided sovereignty.

In a great case involving a direct conflict of authority, between the United States and the State of Maryland, and also involving the vital principles of the government, the powers of the state and federal government, and their relations to each other, under the constitution, Chief Justice Marshall said: "The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the union and those of the states. They are each sovereign, with respect to the objects committed to it, and neither is sovereign with respect to the objects committed to the other."⁵

In a case involving a conflict of authority between the United States and the state of Wisconsin, and in which the state supreme court had discharged upon writ of *habeas corpus* a prisoner held in custody under a conviction and sentence of a United States district court held in that state, Chief Justice Taney, after stating the case, said: "The judges of the supreme

Pet. 102 (9:648); *M'Culloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Ableman v. Booth*, 21 How. 506, 526 (16:169); *Dred Scott v. Sanford*, 19 How. 393, 633 (15:691); *Dobbins v. Comrs.*, 16 Pet. 435 (10:1022); *Cooley v. Port Wardens*, 12 How. 299 (13:996); *Wilson v. Black Bird Creek Marsh Co.*, 1 Pet. 245 (7:413); *Gilman v. Sheboygan*, 2 Black. 510, 518 (17:305); *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. 511, 542 (7:242).
⁴ *Barron v. Baltimore*, 7 Pet. 243 (8:672); *Fox v. Ohio*, 5 How. 410 (12:213).
⁵ *M'Culloch v. Maryland*, 4 Wheat. 316, 437 (4:579).

court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such a thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the union, for an offense against the laws of the state in which he was imprisoned.

* * * The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities." * In a case decided by the supreme court at the

* *Ableman v. Booth*, 21 How. 506, case, the same learned judge, 526 (16:169). In the *Dred Scott* speaking of the federal govern-

December term, 1871, involving a conflict of authority between the federal government and the state of Wisconsin, Field, Justice, quoted with approval the above opinion of Chief Justice Taney, and announced, without qualification the same doctrine;⁷ and throughout the decisions of that court the principle is referred to as an axiom of the government.⁸

§ 181. Same—Municipal sovereignty of the states defined.—The distinction between national sovereignty and municipal sovereignty is not an arbitrary one, but it naturally arises out of the nature of government, and has often been recognized by the United States supreme court as a distinction which marks the boundary line between federal and state power.⁹ In one case, the court, discussing the power of the United States in the territories, said:

“By the constitution, as is now well settled, the United States, having rightly acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition.”¹⁰

While the municipal sovereignty is, from its nature, incapable of exact definition or limitation, and “it is much easier to perceive and realize the sources of it, than to mark its boundaries, or prescribe limits to its exercise,” yet the supreme court has made efforts to define it; in a case involving the validity of an act of the state of New York regulating the landing of passengers from any foreign country, it is defined as follows:

“We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the

ment, said: “For although it is sovereign and supreme in its appointed sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation.”

⁷ United States v. Tarble, 13 Wall. 397, 413 (20:597).

⁸ United States v. Cruikshank, 92 U. S. 542 (23:588).

⁹ Pollard v. Hogan, 3 How. 212, 235 (11:565); American Ins. Co. v. 356 Bales Cotton, 1 Pet. 511, 542

(7:243); Benner v. Porter, 9 How. 235, 242 (13:119); Cross v. Harrison, 16 How. 164, 193 (14:889); Bank v. Yankton Co., 101 U. S. 129, 133 (25:1046); Murphy v. Ramsey, 114 U. S. 15, 44 (29:47); Mormon Church v. United States, 136 U. S. 1, 43 (34:478); McAllister v. United States, 174, 181 (35:691); Shively v. Bowlby, 152 U. S. 1, 58 (38:331).

¹⁰ Shively v. Bowlby, 152 U. S. 1, 58 (38:331).

same undeniable and unlimited power over all persons and things within its territorial limits, as any foreign nation, where the jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for the general welfare, by any and every act of legislation which it may deem conducive to those ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of the state is complete, unqualified and exclusive. We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it, whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons or property of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction.”¹¹

Municipal sovereignty is sometimes regarded as synonymous with the “police power,” which is defined by Chief Justice Taney as follows:

“But what are the police powers of a state? They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things

¹¹ New York v. Miln, 11 Pet. 102 (9:648).

within the limits of its dominion. It is by virtue of this power that it legislates.”¹²

In a great case, Chief Justice Marshall, drawing the line between interstate commerce, which is subject to the regulation of congress, and internal or domestic commerce, and over which congress can exercise no control, said:

“The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.” And he stated that inspection laws, while having a remote and considerable influence on interstate commerce, “form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpikes, roads, ferries, are component parts of this mass.”¹³ The state, in the exercise of its municipal sovereignty, may create, establish, maintain and regulate all those civil institutions which are essential to the preservation of good government, and the security, education and welfare of the people, and may modify and change them, as circumstances require.¹⁴

§ 182. ~~Same—Same—~~State’s power of taxation.—The imposition, modification, and removal of taxes, and the exemption of property from such burdens, are an ordinary exercise of the power of state sovereignty.¹⁵ The taxing power of a state is one of its attributes of sovereignty; it exists independently of the constitution of the United States, and underived from that instrument; it may be exercised to an unlimited extent upon all

¹² License Cases, 5 How. 583 (12:291, 292).

¹³ Gibbons v. Ogden, 9 Wheat. 203 (6:72).

¹⁴ Dartmouth College v. Woodward, 4 Wheat. 627, 629 (4:657).

¹⁵ Gilman v. Sheboygan, 2 Black, 510, 518 (17:305).

property, trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government, either expressly or by necessary implication. Before the adoption of the constitution of the United States, each of the states possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by tax on polls, or duties on internal production, manufacture or use, except so far as such taxation was inconsistent with certain treaties that had been made; and the constitution contains no express restriction of this power, other than a prohibition to lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing the states' inspection laws. The state's power of taxation is concurrent with the taxing power of the federal government, and in case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification, the state's power is absolute. The extent to which the power shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the power; and that discretion is restrained only by the will of the people as expressed in the state constitutions, or through elections, and by the condition that it must not be so exercised or used as to directly burden or embarrass the operations of the national government, or hinder the exercise of any powers with which it is vested by the constitution.¹⁶

§ 183. **Same—Same—Taxation of property employed in interstate commerce.**—While the state may not, in the exercise of its taxing power, impose, directly, any burdens upon interstate commerce, yet this principle does not prevent the imposition of state taxes upon property employed in interstate commerce. Mr. Justice Brewer, stating the doctrine upon this subject, with its limitations, laid down the following propositions as having been fully established by the adjudications of the supreme court, and no longer open to discussion, namely: (1) The constitution of the United States having given to congress the power to regulate commerce, not only with foreign

¹⁶ *Union Pacific Railroad Co. v. M'Culloch v. Maryland*, 4 Wheat. Peniston, 18 Wall. 5, 50 (21:787); 316, 437 (4:579).

nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan; (2) no state can compel a party, individual, or corporation, to pay for the privilege of engaging in interstate commerce; (3) this immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, and employed in interstate commerce; (4) the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing, at least, the franchise is not derived from the United States; and (5) no corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor.¹⁷

§ 184. Same—Same—Taxation of intangible property.—While no state can, in the exercise of the taxing power, interfere with the commercial power of the United States, yet it is not and cannot be doubted that each state of the union may tax all property, real and personal, belonging to persons or corporations, and having a legal situs within its limits, although such property be employed in interstate or foreign commerce;¹⁸ and this power of taxation extends not only to tangible property, but also to intangible property.¹⁹

¹⁷ *Atlantic & Pacific Telegraph Co. v. City of Philadelphia*, 190 U. S. 160-169 (47:995), citing a long list of decided cases in support of each of the above propositions.

¹⁸ *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 30 (41:49), and authorities there cited.

¹⁹ *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 225 (41:965); *Adams Express Co. v. Kentucky*, 166 U. S. 171, 185 (41:960).

“In the complex civilization of today, a large portion of the wealth of the community consists in intangible property, and there is nothing in the nature of things, or in the limitations of the federal

constitution, which restrains a state from taxing at its real value such intangible property. * * * To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the taxing power a large portion of the wealth of the country. Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value

§ 185. ~~Same—Same—Same.~~—There is nothing in the federal constitution which restrains a state from taxing the franchise of a corporation at a different and higher rate than the taxation of tangible property in the state.²⁰

§ 186. ~~Same—Same—~~**Power of state to fix situs of stock of corporations for purposes of taxation.**—It is within the competency and power of the state to fix, for the purposes of taxation, the situs of the shares of stock of domestic corporations, whether held by residents or non-residents, at the principal office of the corporation in the state, and to assess them there to the owners, giving notice of the assessment to the corporation, and to require the corporation to pay for and on account of the owners the taxes assessed upon the shares, and to compel such payment without reference to the dividends, giving to the corporation a lien upon the shares of stock for the taxes so paid, and entitling it, when it pays the taxes, to proceed by personal action against the owner of the shares to recover the amount paid. In such scheme of taxation, the corporation is made the agent of the stockholders to receive notice of the assessment, and to represent them in proceedings for the correction of the assessment; and the scheme is due process of law.²¹

§ 187. ~~Same—Same—~~**Power of state to tax personal property without regard to domicile of owner.**—Every state has the

of this intangible property must be excluded from the tax list, and the only property placed thereon the separate pieces of tangible property? * * * Now, it is a cardinal rule which should never be forgotten, that whatever property is worth for the purposes of income and sale, it is also worth for purposes of taxation. * * *

"It is also true that a corporation is, for purposes of jurisdiction in the federal courts, conclusively presumed to be a citizen of the state which created it, but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that state. For the transaction of its business it goes into various states, and wherever it goes as a

corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be." Mr. Justice Brewer in *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 125, 225 (41:965).

²⁰ *Coulter v. Louisville & Nashville Railroad Co.*, 196 U. S. 599 (49:615).

²¹ *Corry v. Baltimore*, 196 U. S. 466 (49:556).

power to tax any personal property found within its jurisdiction, without regard to the place of the domicile of the owner; and a state tax imposed upon the sleeping cars of a foreign corporation, engaged in interstate commerce, taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran its cars in the state bore to the whole number of miles, in that and other states, over which its cars were run, was upheld as a valid exercise of the taxing power of the state.²² Money loaned on notes and mortgages in a state other than that of the domicile of the owner, which, with the notes and mortgages, is kept in the state where loaned, for use or reinvestment, is taxable in the state where it is loaned, and not in the state of the owner's domicile.²³

In the case in this section first above cited, Mr. Justice Gray, delivering the opinion of the court, said:

"No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. * * * As observed by Mr. Justice Story in his commentaries: * * * 'Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice,

²² Pullman Palace Car Company v. Commonwealth of Pennsylvania, 141 U. S. 18, 36 (35:613).

²³ New Orleans v. Stemple, 175 U. S. 309, 323 (44:174), and authorities cited; State Board of As-

sessors v. Compton National D'Ea-compte, 191 U. S. 388, 405 (48:232); Bristol v. Washington County, 177 U. S. 133 (44:701); Blackstone v. Miller, 188 U. S. 189 (47:439).

that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'

"For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or resident of the state which imposes the tax. * * * It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. * * *

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs, their home port and the domicile of their owners.'" ²⁴

§ 188. Same—Same—Inheritance tax.—The state may impose a tax upon the right or privilege of taking property by devise or descent, called an inheritance tax. Regarding this species of taxation it is said:

"1. An inheritance tax is not one on property, but one on succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and

²⁴ Pullman Palace Car Company v. Commonwealth of Pennsylvania, *supra*.

are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.”²⁵

§ 189. System of government not changed by the adoption of the late amendments.—The adoption of the thirteenth, fourteenth and fifteenth amendments was followed by some extreme views as to their effect upon the structure of the government as it had previously existed, and some of them continue to be pressed before the supreme court of the United States upon writs of error to the state supreme courts. It has been contended that the adoption of the amendments has had the effect: 1. To transfer and surrender to the federal government a large share of the municipal sovereignty of the states, involving powers of the most ordinary and fundamental character, and which had been theretofore universally conceded to the states.²⁶ 2. That the provisions contained in the first ten amendments to the federal constitution, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are by virtue of the late amendments to be regarded as privileges or immunities of all citizens of the United States, and that, therefore, the states cannot provide for any procedure in the state courts which could not be allowed and followed in a federal court because of the limitations contained in the first ten amendments.²⁷ These contentions have been put forth: 1. By the congress of the United States, manifested by a large mass of purely municipal legislation, much of which has been declared unconstitutional and void by the supreme court.²⁸ 2. By (1) disappointed liti-

²⁵ *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 303 (42:1037), and authorities cited; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178.

²⁶ *Slaughter-House Cases*, 16 Wall. 36, 130 (21:394); *Civil Rights Cases*, 109 U. S. 3, 62 (27:836).

²⁷ *Spies Case*, 123 U. S. 151 (31:80); *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597); *Hurtado v. Cal.*, 110 U. S. 516 (28:232).

²⁸ *Civil Rights Cases*, 109 U. S.

3, 62 (27:836), holding unconstitutional and void the 1st and 2nd sections of the Civil Rights bill, March 1, 1875, 18 U. S. Stat. at L. 335; *United States v. Harris*, 106 U. S. 629, 644 (27:290), holding unconstitutional and void the 2nd section of the Act of Apr. 20, 1871, 17 U. S. Stat. at L. 13, 14 (sec. 5519, U. S. Rev. Stat.); *United States v. Reese*, 92 U. S. 241, 256 (23:563), holding unconstitutional and void the 3rd and 4th sections of the Act of May 31,

gants in civil cases,²⁹ and (2) by persons convicted of crime,³⁰ who, by writs of error from the supreme court of the United States, to the state courts, have assailed the particular state legislation under which their hopes have been disappointed, as being in conflict with the guaranties of the amendments. But an examination of the authorities above cited in this section will show that, in the opinion of the supreme court, the adoption of the late amendments did not change or destroy any of the main features of the governmental system, nor change the relations of the state and federal governments to each other, nor the relation of those governments to the people, nor disturb the distribution of governmental powers between the state and federal governments, as they had previously existed;³¹ nor have the effect to apply the guaranties of the first ten amendments to the states or to make the provisions thereof restraints upon the state governments.³²

§ 190. **The police power of the states preserved intact.**—It is the settled doctrine of the supreme court of the United States, announced in an unbroken line of decisions, that the states did not intend, by the adoption of the fourteenth amendment, or

1870, 16 U. S. Stat. at L. 140 (secs. 2007, 2008, 5506, U. S. Rev. Stat.); *James v. Bowman*, 190 U. S. 127, 142 (47:979), holding unconstitutional and void the 5th section of the Act of May 31, 1870 (sec. 5507, U. S. Rev. Stat.). See also *Lackey v. United States*, 46 C. C. A. 189; *Karem v. United States*, 57 C. C. A. 486.

²⁹ *Slaughter-House Cases*, 16 Wall. 36, 130 (21:395); *Munn v. Illinois*, 94 U. S. 113, 134 (24:77); *Davidson v. New Orleans*, 96 U. S. 97, 105 (24:616); *McMillen v. Anderson*, 95 U. S. 37, 42 (24:335); *Barbier v. Connolly*, 113 U. S. 27, 31 (28:923); *Iowa C. R. Co. v. Iowa*, 160 U. S. 393 (40:469); *Mugler v. Kansas*, 123 U. S. 623, 678 (31:205); *L. & N. R. Co. v. Commonwealth of Ky.*, 161 U. S. 677, 704 (40:849); *Bowman v. Lewis*, 101 U. S. 22 (25:989).

³⁰ *Hurtado v. Cal.*, 110 U. S. 516, 558 (28:232); *Ex parte Kemmler*, 136 U. S. 436, 449 (34:519); *Gilson v. Mississippi*, 162 U. S. 565, 592 (40:1075); *Neal v. Delaware*, 103 U. S. 370 (26:567); *Bush v. Kentucky*, 107 U. S. 110 (27:354); *Virginia v. Rives*, 100 U. S. 313 (25:667); *United States v. Cruikshank*, 92 U. S. 542 (23:588); *Caldwell v. Texas*, 137 U. S. 692 (34:816); *Leeper v. Texas*, 139 U. S. 462, 467 (35:225); *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597).

³¹ See specially *Slaughter-House Cases*, *supra*, and *Re Kemmler*, *supra*.

³² *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597); *Hurtado v. Cal.*, 110 U. S. 516 (28:232); *Spies v. Illinois*, 123 U. S. 131, 166 (31:80); *Brown v. New Jersey*, 175 U. S. 172, 174 (44:119).

the adoption of any other amendment, to impose a restraint upon their power, sometimes called the police power, to prescribe regulations for the protection and promotion of the interests, convenience, safety, health, life, peace, morals, education, and good order of society, and to enact and enforce laws for the repression and punishment of crime, and to increase the industries of the state, develop its resources, and add to its wealth and prosperity; and that, as government was organized for the protection and promotion of those objects, it cannot divest itself of the power to provide for them, and the fourteenth amendment was not designed to interfere with the exercise of that power by the states.³³ The police power was not by the federal constitution nor any of the amendments thereto transferred to the national government, but was reserved to the states, and upon them rests the duty of so exercising it as to protect the public health and morals; and while, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to congress, yet until there is some invasion of congressional power or of private right secured by the federal constitution, the action of the states in the exercise of this important power cannot be questioned in the courts of the United States.³⁴

The thirteenth and fourteenth amendments were first brought under view of the supreme court of the United States for construction, upon a writ of error to the supreme court of Louisiana, calling in question the constitutionality of a statute of that state, regulating the landing, yarding, inspection and slaughter of all animals whose flesh was intended for food in

³³ Slaughter-House Cases, 16 Wall. 36, 130 (21:395); Barbier v. Connolly, 113 U. S. (28:923); Powell v. Pennsylvania, 127 U. S. 683 (32:256); Mugler v. Kansas, 123 U. S. 623, 678 (31:205); Bartemeyer v. Iowa, 18 Wall. 129 (21:929); Boston Beer Co. v. Massachusetts, 97 U. S. 33 (24:992); Foster v. Kansas, 112 U. S. 206 (28:697); Butchers' Union v. Crescent City Co., 111 U. S. 746, 751 (28:585); Munn v. Illinois, 94 U. S. 113 (24:77); Louisville &

Nashville Railroad Co. v. Commonwealth of Kentucky, 161 U. S. 677, 704 (40:849); Holden v. Hardy, 169 U. S. 366, 398 (42:780); L'Hote v. New Orleans, 177 U. S. 587 (44:899); Davis v. Massachusetts, 167 U. S. 43 (42:71); Stone v. Mississippi, 101 U. S. 814, 821 (25:1079); Douglas v. Commonwealth of Kentucky, 168 U. S. 488, 505 (42:553).

³⁴ L'Hote v. New Orleans, 177 U. S. 587, 600 (44:899).

the city of New Orleans, and other adjacent territory, requiring all such animals to be landed and slaughtered upon the property of a corporation created by the act, prohibiting the slaughter of animals except in the slaughter houses of the incorporation created, for a period of twenty-five years; but requiring the company to provide facilities for the slaughter of animals for the use of the public, and fixing a maximum fee to be paid by all butchers slaughtering animals at the place or places designated. The act provided penalties against all persons violating the provisions of the act. The butchers of New Orleans resisted the enforcement of the statute, alleging that it was in violation of the constitution of the United States in the following particulars: That it created an involuntary servitude forbidden by the thirteenth amendment; that it abridged the privileges and immunities of citizens of the United States; that it denied to the plaintiffs the equal protection of the laws; and deprived them of their property without due process of law, contrary to the first section of the fourteenth amendment. After the case had been twice argued, the court overruled the contentions of the plaintiffs in error, and held that the statute, although it granted exclusive privileges, was within the police power of the state of Louisiana.³⁵ Mr. Justice Miller, who delivered the opinion of the court, after stating the provisions of the statute, said, substantially:

“The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may now be questioned in some of its details. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community. This is called the police power; and it is declared that it is much easier to perceive and realize the existence and sources of it than to mark

³⁵ Slaughter-House Cases, 16 Wall. 36, 131 (21:395).

its boundaries, or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or upon acknowledged general principles, ever can be made, so far as natural persons are concerned. The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise." He then entered into a consideration of all the constitutional questions raised by the plaintiffs in error, and, after an exhaustive examination of them, declared that it was not the intention of the amendments to transfer from the state governments to the federal government the exercise of powers heretofore belonging exclusively to the states.

§ 191. Same—State police regulations incidentally affecting interstate and foreign commerce—Rights secured by the constitution.—One of the most fruitful sources of litigation in the supreme court of the United States, and one which, as shown by the reported cases, is often frivolous, is the contention, most usually brought forward by corporations engaged as common carriers, that state statutes enacted in the exercise of the police power are in conflict with, or are an invasion of the commercial power of the United States. These corporations are continuously engaged in making the most desperate and unreasonable assaults upon the municipal sovereignty and police power of the states, whenever that power is exercised for the protection of the community against corporate rapacity and dereliction of duty to the public. Scarcely any state police regulation of public utilities, however reasonable, just and humane—not even a

state statute prohibiting the operation of freight trains on Sunday, and giving trainmen the seventh day's cessation from labor,³⁶ the wisdom of which is concurred in by the opinions of the "philosophers, moralists, and statesmen of all nations," and "founded in experience, and sustained by science"³⁷—has escaped the determined and vigorous assaults of those "ideal persons," created by the states, and who have turned upon their creators, the state, and sought to destroy their inalienable and unsundered powers. In addition to the claim in such cases that the state legislation involved is in conflict with the commercial power of the United States, the further contention is usually set up that such legislation is in conflict with some right secured by the federal constitution, as that it denies to some person or corporation the privileges or immunities of citizens of the United States, or of life, liberty or property without due process of law, or of the liberty of contract, or the equal protection of the laws.

It would be a hopeless task to undertake to review all of the adjudicated cases upon this important subject and quite beyond the purpose and limits of this work; but it is confidently believed that the rule upon this subject established by all the authorities is substantially as follows:

A statute enacted by a state for the protection and promotion of the interests, convenience, safety, health, life, peace, morals, education, good order, or general welfare of society, or the political community called the state, or for the development of its resources, and which has a real and substantial relation to the public end intended to be accomplished by its enactment, and which is not directed against, nor imposes a direct burden upon interstate or foreign commerce, and which does not contravene the constitution of the United States, nor infringe any right granted or secured by that instrument, is not to be deemed inhibited by the federal constitution, although such state statute may, in its application and operation, incidentally, or indirectly, or remotely, or collaterally affect such commerce, and may reasonably restrict, for the good of the whole community, the rights of corporations and individuals; but when such state statute, even if based upon the acknowledged police power of the state, or purporting to have been en-

³⁶ *Hennington v. State of Georgia*, 163 U. S. 299, 319 (41:166). ³⁷ *Petit v. Minnesota*, 177 U. S. 164, 168 (44:716).

acted for the protection and promotion of the interests, convenience, safety, health, life, peace, morals, education, good order, or general welfare of society, or for the development of the resources of the state, has no real and substantial relation to those objects or either of them, and is in conflict with the exercise by the general government of any power vested in it by the constitution, or is, beyond all question, a plain, palpable invasion of rights secured or granted by the fundamental law, it will be declared invalid and void by the supreme court of the United States, when the question of its validity or invalidity is duly presented to it in an appropriate judicial proceeding between competent parties. In all such cases, however, if there be a well-founded doubt as to the validity of the statute, that doubt must be resolved in favor of its validity.³⁸

§ 192. **Same—Sunday laws.**—The state legislature possessing the undisputed power to enact laws to promote the order and to secure the comfort, happiness, health, and the moral and social elevation of the people composing the political community, may designate one day in the week, when all work and

³⁸ *Lake Shore & Michigan Southern Railway Company v. State of Ohio ex rel. Lawrence*, 173 U. S. 285, 338 (43:702); *Hennington v. Georgia*, 163 U. S. 299, 317 (41:166); *Gilman v. Philadelphia*, 3 Wall. 713 (18:96); *Pound v. Turck*, 95 U. S. 459 (24:525); *Escambia Co. v. Chicago*, 107 U. S. 678 (27:442); *Cardwell v. American Bridge Co.*, 113 U. S. 205 (28:959); *Western Union Telegraph Co. v. James*, 162 U. S. 650 (40:1105); *Richmond & N. Railroad Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311 (42:759); *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (7:412); *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560 (21:710); *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465 (24:527); *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455 (30:237); *Nashville, C. & St. L. R. Co. v.*

Alabama, 128 U. S. 96 (32:352); *Smith v. Alabama*, 124 U. S. 465 (31:508); *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613 (42:878); *New York, N. H. & H. Railroad Co. v. New York*, 165 U. S. 628 (41:853); *Gibbons v. Ogden*, 9 Wheat. 1, 210 (6:23); *Sherlock v. Alling*, 93 U. S. 99, (23:819); *Cooley v. Philadelphia Port Wardens*, 12 How. 299 (13:996); *Mugger v. Kansas*, 123 U. S. 623 (31:205); *Minnesota v. Barber*, 136 U. S. 313 (34:455); *Atkin v. Kansas*, 191 U. S. 207 (48:148); *Sumat v. Davenport*, 22 How. 227 (16:243); *Crowley v. Christensen*, 137 U. S. 86 (34:620); *Louisville & Nashville Railroad Co. v. Commonwealth of Kentucky*, 161 U. S. 670, 704 (40:849); *Munn v. Illinois*, 94 U. S. 113 (24:77); *Pearsall v. Great Northern R. Co.*, 161 U. S. 646 (40:838).

labor within the state, works of necessity and charity excepted, shall cease; but such statutes prescribe a civil duty, and not a religious observance.³⁹ Regulations of this character are valid, although incidentally affecting foreign and interstate commerce, as in the instance of the statute of the state of Georgia forbidding the running of freight trains, with certain exceptions, within the territorial limits of the state on Sunday.⁴⁰

§ 193. **Same—Power of the state to regulate the use of property “affected with a public interest.”**—The police power of the state is not confined to laws and regulations for the protection and promotion of the public safety, health, morals, and good order of society; but whatever is contrary to public policy or inimical to the public interest is subject to the police power of the state, and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which, if exercised in good faith and within constitutional limits, is beyond the reach of judicial control.⁴¹

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. “A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good;” this social compact does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This principle, it is said, “is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas*.” And from this source is derived the police power, which is nothing more

³⁹ *Petit v. Minnesota*, 177 U. S. 164, 168 (44:716); *Hennington v. State of Georgia*, 163 U. S. 299, 319 (41:166); *Bloom v. Richards*, 2 Ohio State, 387; *Specht v. Com.*, 8 Pa. 312, S. C. 49 Am. Dec. 518; *Frollickstein v. Mobile*, 40 Ala. 725; *Ex parte Andrews*, 18 Cal. 678; *State v. Baltimore & Ohio R. Co.*, 24 W. Va. 783; *Scales v. State*, 47 Ark. 476, S. C. 58 Am. Rep.

768; *State v. Awles*, 20 Mo. 214; *Nashville v. Linck*, 12 Lea, 499.

⁴⁰ *Hennington v. State of Georgia*, 163 U. S. 299, 319 (41:166), affirming the case, 90 Georgia, 396.

⁴¹ *Louisville & Nashville Railroad Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 704 (40:849); *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1-27 (51:933).

nor less than the powers of government inherent in every sovereignty to the extent of its dominions; the power to govern men and things. It is a rule of the common law, that, when one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use, and his property thereby becomes "affected with a public interest," and ceases to be "*juris privati* only," and becomes subject to regulation by the state in the interest of the public. This rule of the common law became a part of the municipal law of the American colonies and also of the states, and in the exercise of it they have prescribed regulations, including maximum rates to be charged, controlling common carriers, ferries, warehousemen, wharfingers, millers, and others whose property is devoted to a public use; and the principle has been applied by the state of Illinois to grain elevators or grain warehouses by a statute fixing the maximum of charges for the storage of grain in the city of Chicago and other places in the state having not less than one hundred thousand inhabitants. It was claimed, upon writ of error, that this Illinois statute was repugnant to certain provisions of the federal constitution, among others the fourteenth amendment, in that it deprived the owners of the elevators of their property, without due process of law, and denied them the equal protection of the law; but the supreme court overruled these contentions and upheld the validity of the statute.⁴² In a subsequent case, in which it was alleged, on writ of error, that a statute of New York fixing the maximum charge for elevating, receiving, weighing and discharging grain, by floating and stationary elevators, was unconstitutional, because contrary to the provisions of the first section of the fourteenth amendment to the constitution of the United States, and in which the decision in the Illinois case was questioned, the supreme court, after reviewing the cases, in an opinion upholding the New York statute, said: "It is thus apparent that this court has adhered to the decision in *Munn* against Illinois and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the states."⁴³

⁴² *Munn v. Illinois*, 94 U. S. 113, 154 (24:77).

⁴³ *Budd v. State of New York*, 142 U. S. 517, 552 (36:247).

§ 194. **Same—Regulation of railroads.**—Railroad companies are common or public carriers for hire, incorporated as such with extraordinary powers in order that they may the better serve the public in that capacity, engaged in a public employment affecting the public interest, and their property is devoted to a public use and affected with a public interest, and has ceased to be *jus privati* only; and, therefore, the state, in the exercise of its police power, may, within constitutional limits, by general statutes, or by administrative bodies, regulate the use of railroads within the jurisdiction of the state, and fix maximum rates of charges for the transportation of persons and property, when not forbidden by valid charter contract, without depriving the corporations owning and operating railroads within the state of their property without due process of law, or denying them the equal protection of the laws, within the meaning of the fourteenth amendment to the constitution; and this power may be exercised in relation to a railroad although the act incorporating the company owning and operating it granted to such company the power from time to time to fix, regulate and receive the tolls and charges to be received by it for the transportation of persons and property,⁴⁴ and the fact that a railroad company has been organized and created under the laws of the United States does not exempt its railroad property from the police power of the state,⁴⁵ nor from its taxing power.⁴⁶ But the state cannot, under pretense of regulating fares and freights, require a railroad corporation to carry persons or property without just and reasonable compensation; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law, nor which amounts to an unconstitutional denial of the equal protection of the laws.⁴⁷ Legislation by the

⁴⁴ *Chicago & Northwestern Railway Co. v. Fuller*, 17 Wall. 566, 570 (21:710); *Chicago, Burlington & Quincy Railroad Company v. Cutts*, 94 U. S. 155, 187 (24:94); *Peik v. Chicago & Northwestern Railroad Co.*, 94 U. S. 164, 178 (24:97); *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307, 347 (29:636); *Railroad Co. v. Rich-*

mond, 96 U. S. 529 (24:737); *Munn v. Illinois*, 94 U. S. 134 (24:77).

⁴⁵ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 418 (38:1028).

⁴⁶ *Union Pac. R. Co. v. Peniston*, 18 Wall. 5, 36 (21:787); *Thompson v. Union Pac. R. Co.*, 9 Wall. 579 (19:792).

⁴⁷ *Reagan v. Farmers Loan &*

state, regulating and supervising the operation of railroads is not, in the sense of the constitution, a regulation of commerce; it is a police regulation, and, as such, forms "a portion of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states themselves."⁴⁸

§ 195. Same—Same—The state may prohibit consolidation of parallel railway lines.—In the judicial delimitation between the commercial power of the United States, and the police power of the states, a general rule of constitutional construction, recognized and acted on by the courts is, that whatever is contrary to public policy or inimical to the public interest, is subject to the police power of the state, and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry; and the fact that state legislation, not directed against interstate commerce, but establishing police regulations of interstate railways, interferes indirectly and remotely or collaterally with that commerce, by imposing a burden upon its instrumentalities, and adds something to the cost of transportation by the expense incurred in conforming to such regulation, does not constitute such state legislation an interference with the commercial power of the United States; and while it is true that the police power cannot be exercised over interstate commerce, yet it may be exercised over the instrumentalities of that commerce.⁴⁹ And it is, accordingly, established, that the state may, in the exercise of its police power, forbid and restrain the consolidation of rival, parallel and competing railway lines situated within its territorial limits, whenever, in the

Trust Co., 154 U. S. 362, 413 (38:1014); Atlantic Coast Line R. Co. v. North Carolina Corp. Com., 206 U. S. 1-27 (51:930), and authorities cited.

⁴⁸ Chicago & Northwestern Railway Co. v. Fuller, 17 Wall. 560, 570 (21:710); Louisville & Nashville Railroad Co. v. Commonwealth of Kentucky, 161 U. S. 677, 704 (40:849).

⁴⁹ Louisville v. Nashville Railroad Co. v. Commonwealth of Kentucky, 161 U. S. 677, 704 (40:849); Sherlock v. Alling, 93 U. S. 99 (23:819); Munn v. Illinois, 94 U. S. 113, 154 (24:77); R. Co. v. Cutts, 94 U. S. 155 (24:94); Smith v. Alabama, 124 U. S. 465, 483 (31:508).

opinion of the legislature, such consolidation is calculated to injuriously affect the public interest, although such railways are instrumentalities of, and are engaged in interstate commerce.⁵⁰ A railway company has no power to purchase or acquire the capital stock, franchise and property of another railway company, unless such power is granted by the state; and such power, when granted, is, so long as it remains unexecuted, not a contract, but a mere license, and is revocable by the state; and a provision in a state constitution, prohibiting the consolidation of the capital stock, franchises or property, or the acquiring by purchase or lease of parallel or competing lines of railroad, which was adopted after the granting of a charter power authorizing a railroad company to purchase a parallel line, but before the power was executed, does not impair the obligation of any charter contract.⁵¹ And where by a railway charter, a general power is given to the company incorporated by it to consolidate with, purchase, lease, or acquire the stock of other railroads, which power has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase or lease of or consolidation with parallel or competing lines.⁵² A statute authorizing two railroad companies to consolidate upon "such terms as they may agree upon," or other words of similar import, means such terms as they may agree upon "consistent with the law as announced in their charters and otherwise."⁵³ A consolidation of the stock of two or more railroads results uniformly and necessarily in the creation of a new corporation, and as of the date of the deed of consolidation; and where the charters of the constituent companies contain an exemption of their property from taxation, and, during the time intervening between the incorporation of the constituent companies and the consolidation, a state constitutional provision

⁵⁰ *Louisville v. Nashville Railroad Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 704 (40:849); *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 677 (40:836).

⁵¹ *Louisville & Nashville Railroad Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 704 (40:849);

Adams v. Railroad Co., 77 Miss. 194, 24 S. R. 200.

⁵² *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 677 (40:838).

⁵³ *Adams v. Railroad Co.*, 77 Miss. 194, 24 S. R. 200; *Railroad Co. v. Adams*, 180 U. S. 1, 25 (45:395).

is adopted inhibiting the exemption of railroad property from taxation, the new corporation comes into existence subject to the existing constitution, and the exemptions of the constituent companies are lost.⁵⁴

§ 196. Same—Maintaining safety of railroad crossing.—The states, in the exercise of the police power, may enact all laws and prescribe all regulations necessary and proper to secure the safety of the public against the dangers arising from the crossing of streets and public highways by railroads, without violating the inhibitions of the constitution of the United States against the impairment of the obligation of contracts, the deprivation of property without due process of law, and the denial of the equal protection of the laws; and where a railroad crosses a street at an important point in a populous city, it is not competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the police power of the state, and substitute their views of the public necessities and the public safety for those of the legislature. In all such cases, it is the paramount duty of the state legislature to secure the safety of the community by appropriate legislation, and it has the power to supervise, control and change any such agreements as may be from time to time entered into between cities and railroad companies in respect to such crossings, saving any rights previously vested. The governmental power of self-protection belonging to the states, called the police power, cannot be contracted away; nor can the exercise of rights, nor the use of property, be withdrawn from the liability to governmental regulation and control in particulars essential to the preservation of the community from danger. The state is vested with the govern-

⁵⁴ *Adams v. Railroad Co.*, 77 Miss. 194, 24 S. R. 200; *Ry. Co. v. Berry*, 113 U. S. 465, 476 (28:1055); *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 308 (38:454); *Railroad Co. v. Adams*, 180 U. S. 1, 25 (45:395). For a full and learned discussion of the subject of railway consolidation, see the opinion of Mr. Justice Whitfield in *Adams v. Railway Co.*, 77 Miss. 194, *supra*.

⁵⁵ *Chicago, Burlington & Quincy*

Railroad Co. v. State of Nebraska ex rel. City of Omaha, 170 U. S. 57, 77 (42:948); *New York and New England R. R. Co. v. Town of Bristol*, 151 U. S. 556, 571 (38:269); *Mooney v. Clark*, 69 Conn. 254, 37 Atl. 509; *Newton v. New York, etc., Railroad*, 72 Conn. 429, 44 Atl. 816; *Norwood v. New York, etc., Railroad*, 161 Mass. 265, 37 N. E. 201.

mental power, and charged with the governmental duty to secure safe public highways.⁵⁵

§ 197. **Same—Limiting hours of labor in unhealthy employments.**—A state statute providing that the period of employment of working men in all underground mines, and in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, except in cases of emergency where life or property is in imminent danger, and making a violation of such provisions punishable as a misdemeanor, has been upheld as a valid exercise of the police power, and not in contravention of any provision of the federal constitution; the court placing its decision upon the ground that the state legislature had adjudged, and the experience of mankind shows, that such employments, when too long pursued in consecutive hours of labor, are detrimental to the health of the employees, and that the proprietors of such industries and their operatives do not stand upon an equal footing, the former desiring to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health, and that in such cases the legislature may properly interpose its authority.⁵⁶

But in a more recent case, the supreme court has rendered a reactionary decision, or one showing a counter judicial tendency, declaring invalid a provision of a New York statute, prohibiting the working of employees in bakeries more than sixty hours a week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week, the justice delivering the opinion of the court placing the decision upon the ground "that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee, and that the statute in question was not intended to meet a case of involuntary labor in any form, but was an interference with the liberty of contract secured by the fourteenth amendment to the constitution of the United States."⁵⁷ Mr. Jus-

⁵⁵ Holden v. Hardy, 169 U. S. 366, 398 (42:780).

⁵⁷ Lochner v. New York, 198 U. S. 45, 76 (49:937).

tice Harlan, dissenting from the decision of the court in that case, placed his dissent upon the ground that it is plain that the statute whose validity was involved was enacted to protect the physical well-being of those persons who work in bakeries and confectionery establishments, and the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor, and that whether or not the statute be wise legislation, is not within the province of the supreme court to determine, the courts under our system of government not being concerned with the wisdom or policy of legislation; and that in determining the power of the state of New York to enact the statute, and thereby to interfere with the liberty of contract in the class of cases therein mentioned, and for that purpose inquiring whether the means devised by the statute are germane to the accomplishment of the purpose had in view in its enactment, he found it impossible, in view of common experience, to say that there is no real or substantial relation between the means employed and the end sought to be accomplished by the statute, nor that the statute has no appropriate or direct connection with that protection of health which each state owes to its citizens, nor that it is not promotive of the health of the employees in such establishments, nor that the regulation prescribed by the statute is utterly unreasonable and extravagant or wholly arbitrary, nor that the statute is beyond question a plain, palpable invasion of rights secured by the fundamental law.⁵⁸

§ 198. —**Same—State statute requiring company “store orders” to be redeemed in cash.**—A state statute requiring all persons, firms, corporations and companies, using coupons, scrip, punchouts, store orders or other evidences of indebtedness to pay their laborers and employees for labor, shall, if demanded, redeem the same at their face value, in the hands of such laborers, or bona fide holders, in lawful money of the United States, when seasonably presented for payment, and providing a legal remedy for the collection of the same, has been upheld by the supreme court of the United States as a valid exercise

⁵⁸ *Lochner v. New York*, supra, dissenting opinion of Mr. Justice Harlan.

of the police power, the *ratio decidendi* being that in such cases the employee is at a disadvantage with the employer in the matter of wages, and the tendency of the statute is to remove that inequality, and to place the employer and employee upon equal ground, and protect the latter from a diminution of the price of his labor by a discount of the "evidence of indebtedness" in which his wages might be paid.⁵⁹

§ 199. **Same—Health regulations.**—The authority of the state to establish, maintain and administer health laws and regulations is derived from the police power, a power which the states possessed before the organization of the federal government, and which they did not surrender in becoming members of the union under the constitution; and although the supreme court of the United States has refrained from any attempt to define the limits of that power, yet it has, in numberless judicial judgments, distinctly recognized the authority of the state to enact, and administer by agencies of its own creation, quarantine laws and health laws of every description, and, indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. And according to the settled principles of the constitution, and the division of governmental powers under it, as declared by the supreme judicial tribunal, the police power of a state is held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety; and it is equally well-settled that the state may invest local bodies, created and called into existence by it for purposes of local administration, with authority to in some appropriate way safeguard the public health and the public safety. The mode or manner in which these results are to be accomplished is within the discretion of the state, subject, of course, so far as federal power is concerned, only to the condition that no rule prescribed by the state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police power of a state, must always yield in case of conflict in the

⁵⁹ Knoxville Iron Co. v. Harbison, 183 U. S. 13 (46:55)

exercise by the general government of any power it possesses under the constitution, or with any right which that instrument gives or secures.⁶⁰ A state legislature, acting within its competency, when establishing regulations for the arrest and abatement of local epidemics of diseases, and attempting to apply specific remedies for their extirpation, is presumed to be aware of the existence of opposing medical theories applicable to the subject, when such opposing theories do in fact exist, and is compelled, of necessity, to choose between them, and such choice is not subject to judicial review. And a state statute providing that the board of health of any city or town within the state, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination, except children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination, no such exception being made in favor of adults, and imposing a penalty for any violation of the act, and the adoption pursuant to the act by the local board of health of a city of a regulation reciting the increasing prevalence of smallpox in the city, and that the public health and safety require the speedy vaccination of all the inhabitants of the city, and directing that the same should be speedily accomplished, and appointing a designated physician to enforce the vaccination of all persons within the city, have been upheld as a valid exercise of the police power, and not an infringement of any rights granted or secured by any provision of the federal constitution.⁶¹

§ 200. Same—Power of municipal corporations to impose license fee on interstate telegraph lines to pay cost of police supervision.—Municipal corporations may, by legislative permission, exercise local governmental supervision over telegraph lines engaged in interstate commerce, and may impose and collect an annual license fee on each pole and each mile of wire within its limits, for the purpose of covering the expense incurred in the enforcement of such governmental supervision and the proper and necessary police rules and regulations.

⁶⁰ *Jacobson v. Massachusetts*, 197 U. S. 11-39 (49:643), and authorities cited.

⁶¹ *Jacobson v. Massachusetts*, 196 U. S. 11-39 (49:643).

Such a license fee is not a tax on the property of the company, nor on its transmission of messages, nor on the receipts from such transmission, nor on the privilege of interstate commerce, but is a charge to reimburse the expenses of police supervision of the property and instrumentalities used therein, the municipality not being bound to furnish such supervision at its own cost.⁶²

§ 201. **Same—Power of the state to protect local commerce and local industries from unlawful restraints and monopolies.** All contracts, agreements, combinations and conspiracies, whose inevitable tendency is to impose restraints upon, or to prevent or diminish competition or increase or diminish prices, or wages, or to create monopolies, in local commerce, or in mining or manufactures, or in furnishing to the public illuminating gas, or coal, or other articles or commodities of prime necessity, are injurious to the public, and contrary to public policy; and the state may, in the exercise of its police power, repress and extirpate such evils, either by appropriate legislation, or by the application of the principles of the common law, as the case may require.⁶³

⁶² *Atlantic & Pacific Telegraph Co. v. City of Philadelphia*, 190 U. S. 160, 169 (47:995); *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419 (47:240).

⁶³ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173; *Arnot v. Pillston & E. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *People v. Chicago Gas Light Trust Co.*, 130 Ill. 269, 22 N. E. 798, 8 L. R. A. 497; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *India Boggang v. Kock*, 14 La. Ann. 164; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 412 (32:979); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785; *Judd v. Harrington*, 139 N. Y.

105, 34 N. E. 790; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707; *Nester v. Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660; *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. 1074; *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888; *Ford v. Association*, 155 Ill. 166, 39 N. E. 651; *Bishop v. Preserves Co.*, 157 Ill. 284, 41 N. E. 765; *Association v. Niezerowski*, 95 Wis. 129, 70 N. W. 166; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581; *Oil Co. v. Adam*, 83 Texas, 650, 19 S. W. 274; *State v. Shippers' Compress & Warehouse Co.*, 95 Texas, 603, 69 S. W. 58; *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S. W. 951; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 47 (44:657); *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 133

§ 202. Same—Same—Distinction between commerce and manufactures.—In cases where the commercial power of the United States is invoked, for the purpose of repressing monopolies in, and restraints upon, and conspiracy against trade and commerce, it is important to observe the distinction between commerce,⁶⁴ and manufactures,⁶⁵ and other local industries, in order to determine whether the transaction in question falls within the corrective jurisdiction of congress, or within the police power of the state. The fact that an article is manufactured for export to another state does not of itself make it an article of commerce; and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and becomes an article of commerce; and a combination within a state intended to secure a monopoly of the manufacture of sugar in that state relates to manufacture, and not to interstate or foreign commerce, although the commodity manufactured is intended for export to other states and foreign countries.⁶⁶ But when a contract is made for the sale and delivery of an article in another state, the transaction is one of interstate commerce, although the vendor has also agreed to manufacture the article so sold, and a combination to control and monopolize such transactions is a restraint of interstate commerce, and obnoxious to the statute enacted by congress upon that subject.⁶⁷

§ 203. Same—Growth and expansion of the police power since the adoption of the late amendments.—The discussion, in this connection, of the police power of the states, has been, in part at least, in support of the general proposition, that the adoption of the thirteenth, fourteenth and fifteenth amendments to the federal constitution has not had the effect to change our theory and system of government, nor to change

(49:689); *United States v. E. C. Knight Co.*, 156 U. S. 1, 46 (39:325); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 721.

⁶⁴ *United States v. E. C. Knight Co.*, 156 U. S. 1 (39:325).

⁶⁵ *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (44:136).

⁶⁶ *United States v. E. C. Knight Co.*, 156 U. S. 1 (39:325); *Kidd v. Pearson*, 128 U. S. 1, 24 (32:346); *Coe v. Errall*, 116 U. S. 517 (29:715).

⁶⁷ *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (44:136).

the relations of the state and federal governments to each other, nor the relations of those governments to the people, nor to disturb the distribution of governmental powers between the state and federal governments, as they had previously existed;⁶⁸ and it is submitted that an examination of the decisions of the supreme court of the United States upon this subject will show that the police power of the states has grown, developed and expanded in its application more since the adoption of the late amendments, than in the whole of our constitutional history prior to that time. The expanding character of this power is recognized by the supreme court of the United States in an opinion by Mr. Justice Brown, in which he said: "The right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police power. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the last century, owing to the enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precaution for their well-being and protection, or the safety of adjacent property. While this court has held that the police power cannot be brought forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." And after quoting from an opinion of Chief Justice Shaw upon the extent and limitations of the power, he added: "This power, legitimately exercised, can neither be limited by contract nor bartered away by legislation. While this power is necessarily inherent in every form of government, it was, prior to the adoption of the constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection to a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether pro-

⁶⁸ Ante, sec. 175.

hibited, or made the subject of stringent police regulations. The power to do this has been repeatedly affirmed in this court."⁶⁹

§ 204. The power of the states to maintain their own internal polity and judicial systems not taken away by the fourteenth amendment.—The fourteenth amendment did not deprive the states of their power, each, respectively, to divide its territory into appropriate and convenient political and judicial divisions, and to devise, determine, adapt, establish and maintain its own internal polity and judicial system, and to create, ordain, establish and maintain its own courts of judicature and distribute its judicial power, and prescribe its own judicial procedure, and to adjust the whole to the varied and varying necessities of its people, and to regulate, modify or change the same as the growth and changing conditions of society may require; the only limitation upon the power is, that no state can deprive particular persons or classes of persons of equal and impartial justice under the law, nor subject them to the partial and arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.⁷⁰

In the case first above cited, it was held that the clause of the fourteenth amendment, which prohibits a state from denying to any person the equal protection of the laws, did not thereby prohibit the state from prescribing the jurisdiction of

⁶⁹ Holden v. Hardy, 169 U. S. 366, 398 (42:780).

⁷⁰ Bowman v. Lewis, 101 U. S. 22 (25:989); Leeper v. Texas, 139 U. S. 462, 467 (35:225); Caldwell v. Texas, 137 U. S. 692 (34:816); Hurtado v. California, 110 U. S. 516 (28:232); Spies v. Illinois, 123 U. S. 131, 166 (31:80); Walker v. Sauvinet, 92 U. S. 90 (23:678); Gibson v. State of Mississippi, 162 U. S. 565, 592 (40:1075); Ex parte Kemmler, 136 U. S. 436, 449 (34:519); Iowa Central Railway Company v. Iowa, 160 U. S. 389, 394 (40:467); McElvaine v. Brush, 142 U. S. 155, 160 (35:971); Freeland v. Williams, 131 U.

S. 405 (33:193); Church v. Kelsey, 121 U. S. 282 (30:960); Robards v. Lamb, 127 U. S. 58 (32:60); Kauffman v. Wooters, 138 U. S. 285; York v. Texas, 137 U. S. 15 (34:604); Johnson v. Chicago & Pac. Elev. Co., 119 U. S. 388 (30:447); Louisville & Nashville Railroad Co. v. Schmidt, 177 U. S. 230 (44:747); Simon v. Craft, 182 U. S. 427 (45:1165); McNulty v. California, 149 U. S. 645 (37:882); Vincent v. California, 149 U. S. 648 (37:884); Brown v. New Jersey, 175 U. S. 175 (44:120); West v. Louisiana, 194 U. S. 258 (48:965); Maxwell v. Dow, 176 U. S. 581, 617 (44:597).

its several courts either as to their territorial limits or the subject-matter, or amount or finality of their respective judgments or decrees; that a state might establish one system of laws in one portion of its territory and another system in another, provided it did not encroach upon the proper jurisdiction of the United States, nor abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws in the same district, nor deprive him of his rights without due process of law. In the course of the opinion, which was delivered by Mr. Justice Bradley, he said:

“We might go still further and say, with undoubted truth, that there is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or classes of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in the same place and under like circumstances. The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversity in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by a jury, and on the other side no such right. Each state prescribes its own modes of judicial proceedings. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be es-

essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where a part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies. If a Mexican state should be acquired by treaty and added to an adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the fourteenth amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard for the welfare of all classes within the particular territory or jurisdiction.”⁷¹

§ 205. Same—Sovereignty for protection of fundamental rights rests with the states—Not in the federal government.—Since the adoption of the fourteenth amendment, as anterior to that time, the states are charged with the sovereign duty of, and vested with the sovereign power for, the protection and vindication of the rights of life, liberty and property of their citizens, and may enact and enforce all laws, not inconsistent with the constitution of the United States, which they may deem appropriate to that end; the amendment furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society, and authorizes congress to enforce its provisions by appropriate legislation, but it does not confer upon congress the power to enact a code of municipal laws, covering the domain of the rights of life, liberty and property, defining them, and providing for their protection and vindication. The pri-

⁷¹ Bowman v. Lewis, 101 U. S. 22 (25:989).

mary reason for the adoption of that amendment was to secure the enjoyment of liberty to the colored race; yet it is not restricted to that purpose, and it applies to every one, white or black, who comes within its provisions. But the protection of the citizen in his rights as a citizen of the state still remains with the state; and sovereignty, for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. The amendment is directed against state action; it is prohibitory in its character; its provisions are prohibitions upon the states, and the legislation which congress is authorized to enact is such legislation as may be appropriate to enforce the prohibition, and correct and annul the prohibited state action and provide relief against it.⁷² In the "Civil Rights Cases," in which the supreme court held the first and second sections of the "Civil Rights Act" unconstitutional, Mr. Justice Bradley, delivering the opinion of the court, said:

"The first section of the fourteenth amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory on the states. It declares that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or

⁷² Slaughter-House Cases, 16 Wall. 36 (21:394); United States v. Cruikshank, 92 U. S. 542 (23:588); Civil Rights Cases, 109 U. S. 3, 62 (27:836); United States v. Harris, 106 U. S. 629, 644 (27:290); Hurtado v. California, 110 U. S. 516 (28:232); Brown v. New Jersey, 175 U. S. 172 (44:119); McNulty v. California, 149 U. S. 645 (37:882); Re Kemmler, 136 U. S. 436, 448 (34:519); Hodgson v. Vermont, 168 U. S. 262 (42:461); Holden v. Hardy, 169 U. S. 366 (42:780); Ballu v. Nebraska, 176 U. S. 83 (44:382); Re Converse, 137 U. S. 624 (34:796); Caldwell v. Texas, 137 U. S. 692 (34:816); Leiper v. Texas, 139 U. S. 462 (35:225); Virginia v. Rives, 100 U. S. 313 (25:667); United States v. Cruikshank, 1 Woods, 316.

property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests congress with the power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effect of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with the power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. * * * Until some state law has been passed or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and state acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the right of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights

appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property, which include all civil rights that men have, are, by the amendment, sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection. In fine, the legislation which congress is authorized to adopt in this behalf, is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the state may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

“An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states: it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in states that may have violated the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of in-

dividuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authority.”⁷³

§ 206. Same—Same—Same—Individual invasion of the rights guarantied by the fourteenth amendment.—Inasmuch as the prohibitions of the fourteenth amendment have reference to state action exclusively, and not to any action of private individuals, it, therefore, follows that congress has no power to enact legislation framed to protect from invasion by private persons the rights guarantied by the amendment;⁷⁴ and congress cannot confer on the federal courts jurisdiction to indict, try and punish private individuals for conspiring to deprive citizens of the United States, in a state, of the rights secured by the amendment.⁷⁵ Congress had no power to enact the second section of the enforcement act of April 20, 1870, which attempted to make it a highly penal offense for two or more persons in any state or territory to “conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws.”⁷⁶ That provision of the statute has been held unconstitutional and the supreme court, in passing upon its validity, after a review of the authorities, said:

“These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the fourteenth amendment. The language of that amendment does not leave the subject in doubt. When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has

⁷³ Civil Rights Cases, 109 U. S. 629, 644 (27:290); Civil Rights Cases, 109 U. S. 3, 62 (27:836).

⁷⁴ Ex parte Commonwealth of Virginia, 100 U. S. 313, 338 (25:667); United States v. Cruikshank, 92 U. S. 544 (23:588);

⁷⁵ United States v. Cruikshank, 92 U. S. 544 (23:588); ⁷⁶ 17 U. S. Stat. at L. 13, 14, U. S. Rev. Stat. sec. 5519.

United States v. Harris, 106 U. S.

deprived any person of life, liberty or property, without due process of law, nor denied to any persons within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon congress.”⁷⁷

And in the “Civil Rights Cases,” Mr. Justice Bradley, stated the principle of constitutional construction as follows:

“In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothed the congress with power to provide a remedy. This abrogation and denial of rights for which the states alone were or could be responsible, was the great seminal and fundamen-

⁷⁷ Harris v. United States, 629 644 (27:290).

tal wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon the wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.”⁷⁸

In one of the cases cited above in this section, involving the power of congress to legislate under the late amendments, and to define, punish and repress crime within the states, Chief Justice Waite, delivering the opinion of the court, said:

“The rights of life and personal liberty are natural rights of man. ‘To secure these rights,’ says the Declaration of Independence, ‘governments are instituted among men, deriving their just powers from the consent of the governed. The very highest duty of the states, when they entered into the Union under the constitution, was to protect all persons within their boundaries in the enjoyment of these ‘unalienable rights with which they were endowed by their Creator.’ Sovereignty, for this purpose, rests alone with the states. * * * The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guaranties, but no more. The power of the national government is limited to this guaranty.”⁷⁹

§ 207. ~~Same—Same—Same—Same—~~Protection of the elective franchise.—The decisions of the supreme court of the United States upon the right of suffrage, since the adoption of the thirteenth, fourteenth and fifteenth amendments, have established the following propositions:

(1) Neither the constitution of the United States as originally adopted, nor any of the amendments thereto, has con-

⁷⁸ Civil Rights Cases, 109 U. S. 3, 62 (27:841).

⁷⁹ United States v. Cruikshanks, 92 U. S. 544 (23:588).

ferred the right of suffrage upon any one. (2) The United States have no voters of their own creation in the states. (3) The right of suffrage is not a necessary attribute of national citizenship. (4) The fifteenth amendment has invested the citizens of the United States with a new constitutional right, namely: exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. (5) This exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude, is a necessary attribute of national citizenship. (6) The right to vote in the states comes from the states; the right to vote is conferred by the state, to be exercised as the state may direct, and upon such terms as to it may seem proper; and in granting the right the state may determine what class or classes of its citizens shall vote, and prescribe the qualifications of electors: provided, always, that no discrimination be made against persons or classes of persons on account of race, color or previous condition of servitude. (7) The first section of the fifteenth amendment, which declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude," is a prohibition upon the government of the United States and upon all the states; the provision is a limitation upon state action, and also upon the action of the federal government, and has no reference to the action of private individuals: and, therefore, congress is without power to enact general legislation framed to protect from invasion by private persons the purity of the ballot and the right to vote.⁸⁰

⁸⁰ James v. Bowman, 190 U. S. 127, 142 (47:979); Minor v. Happersett, 21 Wall. 178 (22:631); United States v. Cruikshank, 92 U. S. 542, 569 (23:588); United States v. Rees, 92 U. S. 214 (23:563); Pope v. Williams, 193 U. S. 621, 634 (48:817); Lackey v. United States, 46 C. C. A. 189; Karen v. United States, 57 C. C. A. 486; United States v. Harris, 106 U. S. 629 (27:290). The first, third,

fourth and fifth sections of the "Enforcement Act," (Act, May 31, 1870, 16 U. S. Stat. at L. 140), were intended to carry into effect the provisions of the fifteenth amendment; but the third, fourth and fifth sections of the act have all been held unconstitutional; these invalid sections constitute secs. 2007, 2008, 5506, 5507 of the U. S. Rev. Stat. (see authorities above cited in this section).

§ 208. **Same—Power of the states to maintain their own judicial procedure.**—The states have full control over the procedure in their own courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution; they, the states, are not tied down by any provision of the federal constitution to the practice and procedure which existed at the common law.⁸¹ The first ten amendments to the federal constitution contain no restrictions on the powers of the states, but were intended to operate solely on the federal government;⁸² and the adoption of the fourteenth amendment did not have the effect to impose upon the states the restraints and limitations in regard to judicial procedure contained in the fourth, fifth, sixth, seventh and eighth amendments to the constitution of the United States.⁸³

(b) THE INTENT AND APPLICATION OF THE LATE AMENDMENTS:
WORKED OUT BY THE "GRADUAL PROCESS OF JUDICIAL IN-
CLUSION AND EXCLUSION."

§ 209. **Judicial method of constitutional construction—Early constitutional history.**—In the great cases carried to the supreme court of the United States in the early period of our constitutional history, the contentions of the respective parties brought under judicial examination the nature of the complex system of government established by the constitution and the distribution of governmental powers under it, and not infre-

⁸¹ *Brown v. New Jersey*, 175 U. S. 172, 177 (44:119) and authorities there cited; *Maxwell v. Dow*, 176 U. S. 581 (44:597) and authorities there cited; *West v. Louisiana*, 194 U. S. 258-267 (48:965).

⁸² *Barron v. Baltimore*, 7 Pet. 243 (8:672); *Fox v. Ohio*, 5 How. 410 (12:213); *Twitchell v. Pennsylvania*, 7 Wall. 231 (19:223); *United States v. Cruikshank*, 92 U. S. 542 (23:588); *Spies v. Illinois*, 123 U. S. 131 (31:80); *Re Sawyer*, 124 U. S. 200 (31:402); *Ellenbecker v. Plymouth County Dist. Ct.*, 134 U. S. 31 (33:801);

Davis v. Texas, 139 U. S. 651 (35:300); *McElvaine v. Brush*, 142 U. S. 155 (35:971); *Thorrington v. Montgomery*, 147 U. S. 490 (37:254); *Miller v. Texas*, 153 U. S. 535 (38:812); *Brown v. New Jersey*, 175 U. S. 172 (44:119); *Holden v. Hardy*, 169 U. S. 366 (42:780); *Maxwell v. Dow*, 176 U. S. 581 (44:597).

⁸³ *Maxwell v. Dow*, 176 U. S. 581 (44:597); *Brown v. New Jersey*, 175 U. S. 172, 177 (44:119); *West v. Louisiana*, 194 U. S. 258, 267 (48:965).

quently put in issue the most vital powers of the federal government. Those cases, although prosecuted by private persons to protect private rights, involved questions of national importance, made so by the contentions of the parties and their counsel; they involved the nature and extent of the respective powers of the state and federal governments, and the question of supremacy in case of a conflict; frequently the decision of the case as to the private right depended upon the question whether the exercise of this or that power belonged to the state or federal government; the doctrine of "strict construction," of all grants of power to the federal government was vehemently insisted upon. In this situation, while the cases called for a decision upon the question of private rights, the national interest in the result was of overshadowing importance; the domestic tranquility of the country required that the principles of the government should be settled by judicial construction of the constitution as speedily as possible, and in that emergency the supreme court seems to have adopted the following methods of constitutional construction:

The court entered upon a consideration (1) of the theory and nature of the dual or complex system of government established by the constitution; (2) a consideration of the classes, nature and extent of the powers conferred upon the general government, and the means and methods of their execution, and in that connection the doctrine of "implied powers," and that clause of the constitution which grants to congress power "to make all laws which shall be necessary and proper for carrying into execution" all the express powers of the government, received full consideration and were given full effect; (3) a consideration of the classes, nature and extent of the powers reserved to the states; (4) a consideration of the lines of demarkation between federal and state power; (5) a consideration of the relations of the state and federal governments toward each other, and the relations of both governments to the people, and the supremacy of the general government and its right of ultimate decision and the means thereof, in all cases of conflict between state and federal authority; and (6) then followed an examination, construction and application of the particular constitutional provision involved, to the case before the court. The court seems to have proceeded upon the assumption that, in view of the character of the con-

tentions made by the respective parties and their counsel, an exposition, examination and understanding of the constitution as a whole, were necessary to an exposition and application of its different provisions, and the opinions of the court, were, necessarily, a discussion and exposition of the government, exhibiting general definitions, and a delimitation of state and federal powers, general rules of constitutional construction, and a statement of the reasoning upon which the decision of the court was founded. It is not by any means contended that the court laid down any formula as to its method of construction; but the process above indicated was, substantially, the settled habit of the judicial mind in constitutional construction during the early period of our constitutional history,⁸⁴ and even as long as Chief Justice Taney remained on the bench.⁸⁵

§ 210. **Same—Modern method—“Judicial inclusion and exclusion.”**—Notwithstanding the late amendments impose important limitations upon the states, securing valuable rights against state invasion, and these limitations are being constantly invoked, upon writ of error from the supreme court of the United States to the highest courts of the state, for the purpose of avoiding state action, and setting aside state legislation, yet, nevertheless, the court has steadily refused to announce any definition of the rights so secured, or to lay down any general rules for the construction and application of the provisions of the late amendments, and has announced that it will ascertain the intent and application of the different provisions of the amendments “by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.”⁸⁶

⁸⁴ *Martin v. Hunter's Lessee*, 1 Wheat. 304, 382 (4:97); *Cohens v. Virginia*, 6 Wheat. 264, 448 (5:252); *McCulloch v. Maryland*, 4 Wheat. 316, 434 (4:579); *Gibbons v. Ogden*, 9 Wheat. 1, 240 (6:23); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *New York v. Miln*, 11 Pet. 102 (9:648); *License Cases*, 5 How. 505 (12:256); *Passenger Cases*, 7 How. 283, 573 (12:702).

⁸⁵ *Dred Scott Case*, 19 How. 393 (15:691); *Ableman v. Booth*, 21 How. 506, 526 (16:169).

⁸⁶ *Davidson v. New Orleans*, 96 U. S. 97, 108 (24:616); *Hargar v. Reclamation Dist.* 111 U. S. 707 (28:572); *Mo. Pac. Ry. Co. v. Humes*, 115 U. S. 512, 524 (29:463); *Oriental Ins. Co. v. Daggs*, 172 U. S. 557, 568 (43:552).

§ 211. **Same—Same—Same—Usual points of alleged conflict—Frivolous contentions of litigants.**—There are three points in which it is most usually alleged that state action is in conflict with the limitations imposed by the amendments, viz: (1) The exercise of the police power by the state;⁸⁷ (2) the exercise of the taxing power by the state;⁸⁸ and (3) the judicial procedure of the state.⁸⁹ And in some cases state legislation is alleged to be in conflict with all three of the limitations contained in the fourteenth amendment.⁹⁰ In a large percentage of the cases, the alleged conflict between the limitations and state action is not only without merit, but absolutely frivolous, so much so that the supreme court has animadverted upon the number and character of the contentions carried there.⁹¹ In the case last cited, the plaintiff in error alleged that, in a proceeding against her under the laws of the state of Louisiana, to subject her real estate to the collection of a local assessment, for local drainage, she was deprived of her property without due process of law, in violation of the limitation in that respect contained in the fourteenth amendment; and the court, in overruling the contention, speaking by Justice Miller, said:

“It is not a little remarkable, that while the provision has been in the constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which

⁸⁷ *Slaughter-House Cases*, 16 Wall. 36, 130 (21:395); *Munn v. Ill.*, 94 U. S. 113, 134 (24:77); *Barbier v. Connolly*, 113 U. S. 27, 31 (28:923); *Mugler v. Kansas*, 123 U. S. 623, 678 (31:205); *Louisville & Nashville Railroad Co. v. Commonwealth of Ky.*, 161 U. S. 677, 704 (40:849).

⁸⁸ *Davidson v. New Orleans*, 96 U. S. 97, 108 (24:916); *Kelly v. Pittsburgh*, 102 U. S. 586 (26:253); *King v. Mullins*, 171 U. S. 404 (43:214); *San Diego Land & T. Co. v. National City*, 174 U. S. 739 (44:1154); *Falbrook Irr. Co. v. Bradley*, 164 U. S. 112 (41:369); *League v. Texas*, 184 U. S. 156 (46:478); et passim.

⁸⁹ *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597) and authorities there cited.

⁹⁰ *Slaughter-House Cases*, 16 Wall. 36, 130' (21:395). In this case, the butchers of New Orleans claimed that a state statute in the exercise of the police power, regulating the slaughter of animals in that city was in conflict with all three of the limitations of the fourteenth amendment, and also imposed upon them “involuntary servitude” in violation of the thirteenth amendment.

⁹¹ *Davidson v. New Orleans*, 96 U. S. 97, 108 (24:916).

the powers of that government has been exercised have been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon all its powers has rarely been invoked in the judicial forum or in the more enlarged theater of public discussion. But while it has been a part of the constitution, as a restraint upon the power of the states, only a few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court, the abstract opinions of every unsuccessful litigant in a state court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.”⁹²

(e) CITIZENSHIP—NATIONAL AND STATE.

§ 212. **Citizenship defined.**—The federal constitution nowhere defines the meaning of the word citizen or citizens, either by way of inclusion or exclusion, except in so far as this is done by the affirmative declaration in the fourteenth amendment, that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside;” and the constitution must be interpreted, and the word citizen defined, in the light of the common law, in whose language the instrument was written, and the principles and history of which were familiarly known to the statesmen who framed it, and the people of the states who adopted it.

According to the principles and definitions of the common law, as ascertained and expounded by the supreme court of the union, a citizen is a member of a political community, owing it allegiance and entitled to its protection, the allegiance of the citizen and the protection of the political community

⁹² Davidson v. New Orleans, *supra*.

being reciprocal obligations, and the one being a compensation for the other; and, as applied to Amercian institutions, a citizen is a member of the political community called the state, and also of the larger, national community, called the United States. Both men and women are citizens.⁹³

⁹³ *Minor v. Happersett*, 21 Wall. 162, 178 (22:627); *Dred Scott v. Sandford*, 19 How. 393 (15:691); *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890); *United States v. Cruikshank*, 94 U. S. 542 (23:388).

In *Minor v. Happersett*, which was an action brought by a woman in a state court in the state of Missouri against a registrar for refusing to register her as a lawful voter, and was carried by writ of error to the supreme court of the United States, Chief Justice Waite, delivering the opinion of the court, said:

"It is contended that the provision and laws of the state of Missouri which confines the right of suffrage and registration therefor to men, are in violation of the constitution of the United States and, therefore, void. The argument is, that as a woman born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the state cannot by its laws or constitution abridge.

"There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment, 'All persons born or naturalized in the United States and subject to the jurisdiction thereof' are expressly declared to be 'citizens of the United States and of the state wherein they re-

side.' But, in our opinion, it did not need this amendment to give them that position. Before its adoption, the constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is compensation for the other; allegiance for protection and protection for allegiance. For convenience, it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. 'Citizens' is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon

§ 213. Same—The African race—Dred Scott case.—Chief Justice Taney held that: The words “people of the United States” and “citizens” are synonymous terms, meaning the same thing, both describing the political body who, according to our republican institutions, form the sovereignty, constitute what we familiarly call the sovereign people, hold the power,

their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the constitution of the United States. When used in this sense, it is understood as conveying the idea of membership of a nation, and nothing more.

“To determine, then, who were citizens of the United States before the adoption of the amendment, it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

“Looking at the constitution itself, we find that it was ordained and established by ‘the people of the United States,’ and then going further back, we find that these were the people of the several states that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth, and that had by Articles of Confederation and Perpetual Union, in which they took the name of ‘the United States of America,’ entered into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion,

sovereignty, trade, or any other pretense whatever.

“Whoever, then, was one of the people of either of these states when the constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

“Additions might always be made to the citizenship of the United States in two ways: first by birth, and second, by naturalization. This is apparent from the constitution itself, for it provides (art. 2, sec. 1), that ‘no person except a natural born citizen, or a citizen of the United States at the time of the adoption of the constitution, shall be eligible to the office of president,’ and (art. 1, sec. 8), that congress shall have power ‘to establish a uniform rule of naturalization.’ Thus new citizens may be born or they may be created by naturalization.

“The constitution does not, in words, say who shall be natural born citizens. Resort must be had elsewhere to ascertain that. At

and conduct the government through their representatives, and that every citizen is one of the people and a constituent member of this sovereignty; and that, neither the negroes of the African race, who, at the time of the Declaration of Independence, had been imported into this country and sold and held as slaves, nor their descendants, whether they had become

the common law, with the nomenclature of which the framers of the constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case, it is not necessary to solve these doubts. It is sufficient for everything we have now to consider, that all children born of citizen parents, within the jurisdiction, are themselves citizens. The words 'all children' are certainly as comprehensive, when used in this connection as 'all persons,' and if females are included in the last they must be included in the first. That they are included in the last is not denied. In fact, the whole argument of the plaintiff proceeds upon that idea."

After showing from the legislative and judicial history of the country, that women have always been considered as citizens the same as men, and holding that they are in fact such, the opinion proceeds:

"The constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them. It certainly is nowhere made so in express terms. The United States has no voters in the states of its own creation. * * * The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the states, but it operates for this purpose, if at all, through the states and the state laws, and not directly upon the citizen."

In *United States v. Cruikshank*, supra, it is said, in the opinion: "Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the

free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument, nor were they included nor intended to be included under the word "citizens" in the constitution, nor were they constituent members of the sovereignty, nor could they become members of the political community formed and brought into existence by the constitution of the United States, nor as such could they become entitled to the rights, privileges, and immunities guarantied by that instrument to the citizen, one of which was and is the privilege of suing in the courts of the United States in the cases specified in the constitution.⁹⁴ In this state of the law, the fourteenth amendment to the constitution was adopted, the first clause of the first section of which declares that, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside," the main purpose of which was to confer citizenship upon the lately enfranchised slave population, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States and of the states wherein they reside.⁹⁵

§ 214. Two sources of citizenship.—There are two sources of citizenship, and two only: (1) Birth in the United States, subject to the jurisdiction thereof; and (2) naturalization under and pursuant to the constitution and laws of the United States. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law; but citizenship by birth is by the mere fact of birth under the circumstances defined in the fourteenth amendment to the constitution. Every person born in the United States, and

people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon, should exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose."

⁹⁴ *Dred Scott v. Sandford*, 19 How. 393 (15:691).

⁹⁵ *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890); *The Slaughter-House Cases*, 16 Wall. 36, 73 (21:394); *Strauder v. West Virginia*, 100 U. S. 303 (25:664); *Ex parte Virginia*, 100 U. S. 339, 345 (25:676); *Neal v. Delaware*, 103 U. S. 370, 386 (26:567); *Elk v. Wilkins*, 112 U. S. 94, 101 (28:643).

subject to the jurisdiction thereof, becomes at once a citizen of the United States and of the state wherein he is born, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the acts conferring citizenship upon foreign born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.⁹⁶

§ 215. Natural-born citizens—Not defined by the constitution—Resort had to the common law.—The constitution of the United States, as originally adopted, uses the words “citizen of the United States,”⁹⁷ and “natural-born citizen”⁹⁸ of the United States, and “citizen of the United States at the time of the adoption of this constitution,”⁹⁹ but that instrument nowhere defines these words, either by way of inclusion or exclusion, except in so far as this is done by the affirmative declaration contained in the fourteenth amendment, that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside,” and resort must be had to the common law to ascertain their meaning.¹ The constitution was written in the language of the common law, whose principles and history were familiarly known to the framers of that instrument and the people of the states who adopted it; and in respect to the words “citizen,” and “natural-born citizen,” and “citizen of the United States at the time of the adoption of the constitution,” as in other respects, that instrument must be interpreted in the light of the history and principles of the common law.² Although there is no common law of the

⁹⁶ *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890); *Minor v. Happersett*, 21 Wall. 162 (22:627); *Elk v. Wilkins*, 112 U. S. 94, 123 (28:643).

⁹⁷ U. S. Const. Art. I, sec. 2, cl. 2, sec. 3, cl. 3.

⁹⁸ U. S. Const. Art. II, sec. 1, cl. 4.

⁹⁹ U. S. Const. Art. II, sec. 1, cl. 4.

¹ *Minor v. Happersett*, 21 Wall. 162 (22:627); *United States v. Wong Kim Ark*, 169 U. S. 647 (42:890).

² *Minor v. Happersett*, 21 Wall. 162 (22:627); *United States v. Wong Kim Ark*, 169 U. S. 647 (42:890).

United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own constitution and statutes, yet there is one clear exception to this principle, namely; the interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history and principles.³

§ 216. **Same—Common law rule.**—By the common law of England, as it existed during the whole colonial period in this country, and the revolutionary period, and at the time of the adoption of the federal constitution, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, protection and jurisdiction of the English sovereign, and, therefore, every child born in England of alien parentage was a natural-born subject of England; except (1) the children of ambassadors or other diplomatic agents of foreign states, and (2) the children of alien enemies in hostile occupation of the place of birth at the time of birth. Subject to the two exceptions stated, any person who, whether of English or of foreign parentage, was born within the British dominions, was a natural-born British subject. By natural-born British subject was meant a British subject who had become such at the moment of his birth.⁴

³ *Smith v. Alabama*, 124 U. S. 465 (31:508); *Moore v. United States*, 91 U. S. 270, 274 (23:346); *Ex parte Wilson*, 114 U. S. 417 (29:89); *Boyd v. United States*, 116 U. S. 616, 624 (29:746); *United States v. Wong Kim Ark*, 196 U. S. 647 (42:890); *Minor v. Happersett*, 21 Wall. 162 (22:627).

⁴ *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890) and authorities cited. "The fundamental principle of the common-law with regard to English nationality, was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith,' or 'power,' of the king. The principle embraced all

persons born within the king's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim *protectio trahit subjectionem subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children born in England of such aliens were, therefore, natural-born subjects. But the children born within the realm of foreign ambassadors, or the children of alien enemies,

§ 217. **Same—Common law rule prevailed in American colonies and under original constitution—Slave population excepted.**—The common law rule upon the subject of citizenship by birth was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards under the articles of confederation, and continued to prevail under the constitution as originally adopted;⁵ with this qualification, however, that, prior to the adoption of the fourteenth amendment to the constitution, neither the negroes of the African race, who, at the time of the Declaration of Independence, had been imported into this country and sold and held as slaves, nor their descendants, whether they had become free or not, were embraced within the rule.⁶

§ 218. **Same—Same—The Indian tribes.**—Neither the Indian tribes found on this continent by the English colonists, and who were here at the time of the Declaration of Independence, nor their descendants, whether within or without the limits of the United States, were within the common-law rule of citizenship by birth; they were no part of the people of the United States, nor were they citizens of the United States, nor could they become such citizens except by the consent and acceptance of the United States through treaties or naturalization laws.⁷

born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the king. * * * Lord Chief Justice Cockburn, in the same year (1869), reviewing the whole matter, said: 'By the common law of England, every person born within the dominions of the crown, no matter whether of English or foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign am-

bassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality." Mr. Justice Gray in *United States v. Wang Kim Ark*, *supra*.

⁵ *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890).

⁶ *Dred Scott v. Sandford*, 19 How. 393, 633 (15:69).

⁷ *Elk v. Wilkins*, 112 U. S. 94, 123 (28:643); *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515; *United States v. Rogers*, 4 How. 567; *United States v. Holliday*, 3 Wall. 407

“Under the constitution of the United States as originally established, Indians not taxed were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were no part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe or such

(18:182); *The Kansas Indians*, 5 Wall. 737 (18:667); *The New York Indians*, 5 Wall. 761 (18:708); *The Cherokee Tobacco, v. United States*, 11 Wall. 616 (20:227); *United States v. Whiskey*, 93 U. S. 188 (23:846); *Pennock v. Comrs.*, 103 U. S. 44 (26:367); *Crow Dog's Case*, 109 U. S. 556 (27:1030); *Goodell v. Jackson*, 20 Johns. 693; *Hastings v. Farmer*, 4 N. Y. 293; *Karrahoo v. Adams*, 1 Dill. 344, 346; *Gray v. Goffman*, 3 Dill. 393; *Hicks v. Butrick*, 3 Dill. 413; U. S. Const. Art. I, secs. 2, 8, Art. II, sec. 2; 7 U. S. Stat. at L.

159, 211, 236, 335, 483, 488; Op. Atty. Gen. Taney, 2 Ops. Atty. Gen. 462; 10 U. S. Stat. at L. 1159; 12 U. S. Stat. at L. 1192; 14 U. S. Stat. at L. 763; 12 U. S. Stat. at L. 1237; 13 U. S. Stat. at L. 624; Acts of Congress of March 3, 1839, ch. 83, sec. 7, and of March 3, 1843, ch. 101, sec. 7, and of August 6, 1846, ch. 88, and of March 3, 1865, ch. 127, sec. 4; 5 U. S. Stat. at L. 351, 647; 9 U. S. Stat. at L. 55; 13 U. S. Stat. at L. 562; 9 U. S. Stat. at L. 955; 11 U. S. Stat. at L. 667; 7 Ops. Atty. Gen. 746.

members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States, for naturalization, and satisfactory proof of fitness for civilized life.”^a

§ 219. Same—Indians not citizens by birth since fourteenth amendment.—An Indian, born a member of one of the Indian tribes within the territorial limits of the United States, is not merely by reason of his birth within the United States and of his afterwards separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States within the meaning of the first section of the fourteenth amendment to the constitution of the United States; such a person, although born in the United States in a geographical sense, was born a member of, and owes his immediate allegiance to an alien, though a dependent political community, and was not, in a constitutional sense, “born in the United States and subject to the jurisdiction thereof.” The first section of the fourteenth amendment did not have the effect to extend the common law rule of citizenship by birth to the members of the Indian tribes, although born within the territorial limits of the United States; and such persons can only become citizens in the second way mentioned in the amendment—that is, by being “naturalized in the United States,” by or under some treaty or statute.⁹

§ 220. The fourteenth amendment affirms and extends the common law rule of citizenship by birth.—The first section of the fourteenth amendment declares that: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside.” This provision is in affirmance and extension of the common law rule of citizenship by birth within the territory, the primary object being to confer citizenship upon the lately emancipated slaves and their descendants, and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the states in

^a Mr. Justice Gray, in *Elk v. Wilkins*, 112 U. S. 94, 123 (28: 643).
⁹ *Elk v. Wilkins*, 112 U. S. 94, 123 (28: 643).

which they reside.¹⁰ “The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children born here of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all persons, of whatsoever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, * * * ‘strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;’ and his child * * * ‘if born in the country is as much of a citizen as the natural-born child of a citizen, and by operation of the same principle.’ It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that * * * ‘independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a natural-born subject might be, unless his case is varied by some treaty stipulation.’ ”¹¹

¹⁰ *Slaughter-House Cases*, 16 Wall. 36, 73 (21:394); *Strauder v. West Virginia*, 100 U. S. 303, 306 (25:664); *Elk v. Wilkins*, 112 U. S. 94, 123 (28:643); *Ex parte Virginia*, 100 U. S. 339, 345 (25: 676); *Neal v. Delaware*, 103 U. S. 370 (26:567); *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890).

¹¹ Mr. Justice Gray, in *United States v. Wong Kim Ark*, 169 U.

§ 221. **Same—Chinese person born in the United States.—** A child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment to the constitution, the opening words of the amendment—"all persons"—being general, not to say universal, and restricted only by place and jurisdiction, and not by race or color.¹²

§ 222. **Same—Meaning of the qualifying words: "And subject to the jurisdiction thereof."**—What is the meaning and import of the qualifying words: "and subject to the jurisdiction thereof"—that is, subject to the jurisdiction of the United States—contained in the citizenship clause of the fourteenth amendment? What is their legal effect? What class of persons born or to be hereafter born in the United States are to be, by those words, excluded from citizenship? These words were, *ex industriae*, placed in the amendment in order to preserve in our law of nationality the two exceptions to the ancient and fundamental common law rule of citizenship by birth within the territory, viz.: the exclusion (1) of children, born in England, of ambassadors and other diplomatic agents of foreign states who had been accredited as the representatives of their governments in England, and (2) the children born of alien enemies within and during a hostile occupation of a part of English territory, such children being excluded because they were not born within the allegiance, protection, power or jurisdiction of the British crown; and (3) the qualifying words were also intended to exclude from citizenship by birth the children of the members of the Indian tribes, who are alien, dependent political communities, standing in a peculiar relation

S. 649, 732 (42:890), citing *Ex. Postnati*, 63; 1 Hale, P. C. 62; 4
 Doc. H. R. No. 10, 1st sess. 32nd Black. Com. 74, 92.
 Congress, p. 4; 6 Webster's Works, ¹² United States v. Wong Kim
 526; *Carlisle v. United States*, 16 Ark, 169 U. S. 649, 732 (42:890);
 Wall. 147, 155 (21:426); *Calvin's Slaughter-House Cases*, 16 Wall.
 Case, 7 Coke 6a; *Ellesmere on* 36, 73 (21:394).

- to the national government, unknown to the common law, and to which Indian tribes their respective members owe immediate allegiance, and are not, within the meaning of the amendment, "subject to the jurisdiction" of the United States.¹³

It is said that: "The real object of the fourteenth amendment, in qualifying the words, 'all persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state—both of which, as has already been shown by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country." And it is further said that the qualifying words are used in the amendment as "the equivalent of the words 'within the limits and under the jurisdiction of the United States,' and the converse of the words, 'out of the limits and jurisdiction of the United States,' as habitually used in the naturalization acts."¹⁴

§ 223. The principle upon which foreign ministers are exempt from local jurisdiction and their children excluded from citizenship by birth.—The immunity of foreign ministers, ambassadors and other diplomatic agents from the jurisdiction of the governments to which they are accredited, and the exclusion of their children from the common law rule of citizenship by birth, are founded, not upon any supposed lack or diminution of the absolute and exclusive sovereignty and jurisdiction of the government in which they are resident over all persons and things within their territorial limits, but upon the consent of such government, based upon a principle of international law and comity, which has been recognized and continuously acted on in practice by all the civilized nations of the world for centu-

¹³ United States v. Wong Kim Ark, 169 U. S. 649, 732 (42:890); Elk v. Wilkins, 112 U. S. 94 (28:643).

¹⁴ United States v. Wong Kim Ark, 169 U. S. 649, 732 (42:890).

ries. This principle of international law and comity is: That the world is composed of distinct sovereign nations, among whom there is perfect equality and absolute independence, neither being in any respect amenable to another, and each vested with absolute sovereignty and jurisdiction within its own territorial limits, which cannot be restricted without its own consent, and each bound by obligations of the highest character not to degrade its own national dignity by placing its sovereign rights within the jurisdiction of another; but the mutual benefit of the nations is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, which, however, cannot be effectively maintained and secured without reciprocally appointing and maintaining permanent resident ambassadors, public ministers, or other diplomatic agents, with power and authority to represent their respective principals in relation to such international intercourse and interchange of good offices. Exemption of a public minister from the local jurisdiction of the country to which he is accredited and in which he is resident, is essential to the dignity of his sovereign principal, and the performance of his duties, and the accomplishment of the objects of his mission, and all sovereign nations have consented to a relaxation, in practice, in such cases, of that absolute and complete jurisdiction within their respective territories which sovereignty confers: and a sovereign nation, in committing its interest with a foreign power to the care of a public minister, selected by it for that purpose, cannot intend, and does not intend, to subject him in any degree to that power; and, therefore, the consent of the governing power of the country to which such minister is accredited, implies a consent that he shall possess those privileges and immunities which his sovereign principal intended he should retain, and that he shall be exempt from the local jurisdiction of that country.¹⁵

¹⁵ *Exchange v. McFadden*, 7 Cranch, 116, 147 (3:293); *United States v. Wong Kim Ark*, 169 U. S. 647, 732 (42:890). In the case here first cited, the great principle of international law outlined in the text, and the reason upon

which it is founded, are lucidly set forth by Chief Justice Marshall in the opinion of the court. In that case, which involved the question, whether an American citizen can assert, in an American court, a title to an armed na-

§ 224. Same—Same—The doctrine of Chief Justice Marshall re-affirmed by recent decision.—The doctrine in regard to the exemption and immunity of foreign ministers from the local jurisdiction in which they are resident, as stated by Chief Justice Marshall in the case of *The Exchange*,¹⁶ was re-affirmed in

tional vessel, belonging to a foreign friendly nation, the great Chief Justice, expounding the principle of exemption from national jurisdiction in certain cases, said:

"In exploring an unbeaten path, with few, if any, aids from precedents, or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this. The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determi-

nate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories, which sovereignty confers. This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

"This full and absolute full territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign be-

¹⁶ *Exchange v. M'Faddon*, 7 Cranch, 116 (3:287).

a recent case in the supreme court of the United States, involving the citizenship of a person born in the United States, in the course of the opinion in which it was substantially said that: In the great case of *The Exchange*, the grounds upon which foreign ministers are, and other aliens are not, exempt from the

ing in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

"1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

"Why has the whole civilized world concurred in this construc-

tion? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection, that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart fully security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the case under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equals, which a romantic confidence in their magnanimity has placed in their hands.

"2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign min-

jurisdiction of this country, were set forth by Chief Justice Marshall in a clear and powerful train of reasoning. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before the court until some years afterwards, nor upon the case of a suspension of the sovereignty of the United States

isters. Whatever may be the principle on which this immunity is established, whether we consider him in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it. This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds upon the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local

allegiance to a foreign prince, and would be less competent to the objects of his mission.

A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

"In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an enquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them." *Exchange v. M'Faddon*, *supra*.

over part of their territory by reason of a hostile occupation. But in all other respects it covers the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof. And it was held that the opinion of Chief Justice Marshall established, as incontrovertible principles, that the jurisdiction of every nation within its own territory is exclusive and absolute, and is susceptible of no limitation not imposed by the nation itself; and that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent, express or implied; and that upon its consent to cede or to waive the exercise of a part of its territorial jurisdiction, rest the exemptions from that jurisdiction of foreign sovereigns or their armies entering its territory with its permission, and of their foreign ministers and public ships of war; and that the implied license under which private individuals of another nation enter the territory and mingle indiscriminately with its inhabitants, for purposes of business or pleasure, can never be construed to grant to them an exemption from the jurisdiction of the country in which they are found.¹⁷

§ 225. **Same—Same—Consuls and their children not within the principle.**—Consuls, as such, are not within the principle and reason by which foreign ministers are exempt from the jurisdiction of the nations to which they are accredited, and their children excluded from the common law rule of citizenship by birth; and it therefore follows, logically, that the children born of foreign consuls in this country are citizens of the United States and of the states wherein they are born. For it is the well-settled law that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as intrusted with authority to represent their sovereign in his intercourse with foreign states or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the country in which they reside.¹⁸

¹⁷ *United States v. Wong Kim Anne*, 3 Wheat. 435, 446 (4:428); *Ark.*, 169 U. S. 649, 732 (42:890). 1 Kent, Com. 44; Story, *Confl.*

¹⁸ *Re Baiz*, 135 U. S. 403, 424 Laws, § 249; Wheaton, *International Law*, (8th Ed.) § 249; *Red-Taney*, 1, 10 Fed. Cas. —; *The mond v. Smith*, 22 Tex. Civ. App.

A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it.¹⁹

When a consul is appointed *charge d'affaires*, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as *charge d'affaires* and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister.²⁰

§ 226. Principle upon which children born in hostile occupation are excluded from citizenship.—The principle upon which children born of alien parents within and during a hostile occupation of a part of the territory of the country in which they are born are excluded from citizenship by the rules of the common law is, that, by the conquest and military occupation of the territory, the invading enemy acquires that firm possession which enables him to exercise the fullest rights of sovereignty over the place; the sovereignty of the rightful ruler, or government, is suspended, and his laws or its laws cannot, during such hostile occupation, be rightfully enforced there, or be obligatory upon the inhabitants who remain and submit to the conquerors. By a surrender of the territory by the rightful owner, the inhabitants pass under a temporary allegiance to the invading sovereign, and are bound by such laws, and such only, as he chooses to recognize and enforce. From the nature of the case, no other laws could be obligatory upon the inhabitants of the territory subject to hostile occupation, for where there is no protection or allegiance or sovereignty, there can be no

322, and authorities cited in opinion by Neill, Justice; *Pooley v. Luco*, 76 Fed. 148; *In Re Iasigl*, 79 Fed. 752.

¹⁹ Mr. Justice Story in *The Anne*, 3 Wheat. 435 (4:428).

²⁰ Chief Justice Fuller in *Re Baiz*, 135 U. S. 403 (34:222).

claim to obedience, and children born of alien parents within and during such hostile occupation, are not born within the allegiance, protection, power and jurisdiction of the rightful sovereign owner of the territory, and are, therefore, excluded from the common law rule of citizenship within the territory.²¹

§ 227. **Same—Persons born within the seceded states.**—It would seem from the decisions of the supreme court of the United States, upon the status of the seceded and confederate states during the war between the states, that the principle which excludes from citizenship children born of alien parentage within and during hostile occupation of a part of the territory of the country, could not be applied to children born within any of those states during that period. The settled doctrine of the court, as to the status of those states during that period is, that the ordinances of secession adopted by their conventions and ratified by a majority of their citizens, respectively, and all the acts of their respective legislatures intended to give effect to those ordinances, were, under the constitution of the United States, utterly without operation in law, and absolutely null and void, and those states did not cease to be members of the American union, nor did they cease to be states, nor did the citizens of those states cease to be citizens of the United States. Those states did not become foreign, nor did their citizens become aliens, and their occupation, though hostile, was not an alien occupation.²²

§ 228. **Resume as to the qualifying words in the citizenship clause of the fourteenth amendment.**—It cannot be doubted that the framers of the fourteenth amendment to the federal constitution, when they inserted in the citizenship clause thereof the qualifying words, “and subject to the jurisdiction thereof,” had in mind the common law rule of citizenship by birth, and the established exceptions to that rule, and also the peculiar relation of the Indian tribes to the general government, and intended to preserve those exceptions in our law of

²¹ *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890); *United States v. Rice*, 4 Wheat. 246 (4:562). 96 U. S. 176 (24:716); *Keith v. Clark*, 97 U. S. 454 (24:1071); *White v. Cannon*, 6 Wall. 443 (18:923); *Spratt v. United States*, 20 Wall. 459 (22:371); *Dewing v. Perdicaries*, 96 U. S. 193 (24:654).

²² *Texas v. White*, 7 Wall. 700 (19:227); *White v. Hart*, 13 Wall. 646 (20:685); *Williams v. Bruffy*, 14

nationality; and that to be "born * * * in the United States, and subject to the jurisdiction thereof," means to be born within the territorial limits of the United States, and of parents who are not ambassadors or foreign ministers, nor aliens in hostile occupation of a part of our territory, nor members of any of the Indian tribes. The qualifying words must be read in the light of the common law, and also in the light of the former adjudications of the supreme court upon the political status of the Indian, and the legislation of congress concerning them, and treaties made by the general government with them.²³

§ 229. Citizenship by naturalization.—The second source of citizenship is by naturalization. By the constitution of the United States, congress was granted power "to establish an uniform rule of naturalization,"²⁴ and, pursuant to this power, congress has, by successive acts, beginning with the act entitled "An Act to Establish an Uniform Rule of Naturalization," passed at the second session of the first congress under the constitution, made provision for the admission to citizenship of four principal classes of persons: (1) Aliens who have resided for a certain time within the limits and under the jurisdiction of the United States, and naturalized individually by proceedings in a court of record; (2) children of persons so naturalized, dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization; (3) all children born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, such fathers having resided in the United States;²⁵ and (4) women married to citizens of the United States, and who might themselves be lawfully naturalized.²⁶

§ 230. Same—Citizenship of married woman follows that of her husband.—The object of the second section of the act of

²³ Ante, sections 196-207, and authorities cited.

²⁴ U. S. Const. Art. I, sec. 8, cl. 4.

²⁵ 1 U. S. Stat. at L. p. 103, chap. 3, p. 414, chap. 20, p. 566, chap. 5; 2 U. S. Stat. at L. p. 153, chap. 28, p. 292, chap. 47; 10 U. S. Stat. at L. p. 604, chap. 71; U. S. Rev. Stat.

§§ 1993, 2165, 2172; *United States v. Wong Kim Ark*, 169 U. S. 649, 732 (42:890).

²⁶ 10 U. S. Stat. at L. 64, chap. 71, sec. 2; U. S. Rev. Stat. § 1994; *Kelly v. Owen*, 7 Wall. 496, 499 (19:283).

congress of Feb. 10, 1855, was to allow the citizenship of married women to follow that of their husbands.²⁷

§ 321. **“Collective naturalization” by the admission of new states into the union.**—The constitution provides that, “new states may be admitted by congress into the union;”²⁸ and congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that in the admission of a state into the union a collective naturalization may be effected in accordance with the intention of congress and the people applying for admission. An admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and also involves the adoption as citizens of the United States of those whom congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of congress.²⁹

§ 232.—**Same—Texas admitted into the union with her population as it stood.**—By the annexation of Texas, under a joint resolution of congress, and its admission into the union on an equal footing with the original states, all the citizens of the former republic became, without any express declaration, citizens of the United States.³⁰ Texas, prior to her annexation, occupied towards the United States the position of an independent sovereignty. Her citizens were determined by her own laws, and those laws prescribed the manner in which aliens might become citizens. The United States admitted Texas as

²⁷ 10 U. S. Stat. at L. 604, chap. 71, sec. 2; U. S. Rev. Stat. § 1194; *Kelly v. Owen*, 7 Wall. 496, 499 (19:283); *Ware v. Wisner*, 50 Fed. 312; *United States v. Kellar*, 13 Fed. 83; *Leonard v. Grant*, 5 Fed. 14, 17; *Broadis v. Broadis*, 86 Fed. 955; *Headman v. Rose*, 63 Georgia, 465; *Kreitz v. Behrensmeyer*, 125 Ill. 197, 8 Am. St. Rep. 376, 17 N. E. 254; *Dorsey v. Brigham*, 177 Ill. 256, 69 Am. St. Rep. 232, 52 N. E. 304, 42 L. R. A. 810; *Luhrs v. Elmer*, 80 N. Y. 177; *Pequiquot v. Detroit*, 16 Fed. 215; *Blythe v. Ayres*,

96 Cal. 562, 31 Pac. 917, 19 L. R. A. 42; 84 Am. Dec. 212, note.

²⁸ U. S. Const. Art. IV, sec. 3, cl 1.

²⁹ *Boyd v. State of Nebraska*, 143 U. S. 135, 186 (36:103).

³⁰ 5 U. S. Stat. at L. 798; 9 U. S. Stat. at L. 108; *McKinney v. Santiago*, 18 How. 235 (15:365); *Cryer v. Andrews*, 11 Tex. 170; *Barrett v. Kelly*, 31 Tex. 476; *Carter v. Territory*, 1 N. M. 317; *Boyd v. State of Nebraska*, 143 U. S. 135, 186 (36:103).

one of the states of the union with her population as it stood under her laws. Those who were citizens of the state became citizens of the United States, while aliens were relegated for naturalization to the laws of the United States on that subject.³¹ An alien minor who did not reside in Texas on the day of the Declaration of Independence, but who emigrated to Texas within less than six months before it was admitted into the union, and remained there until its admission in the union, and who was not naturalized and had not taken the oath of allegiance to Texas, was not a citizen of Texas at the time of its admission, and did not become a citizen of the United States.³²

§ 233. "Collective naturalization" by treaty or statute.—It is well settled that citizenship may spring from collective naturalization by treaty or statute.³³ By the second article of Joy's Treaty,³⁴ British subjects who resided at Detroit and at the time of the evacuation of the territory of Michigan, and who continued to reside there afterwards without at any time prior to the expiration of one year from such evacuation declaring their intention of becoming British subjects became *ipso facto* to all intents and purposes American citizens.³⁵ And by article three of the Treaty of Paris of 1803,³⁶ it was provided that "the inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." Under this provision it was held that a person

³¹ *Contez v. United States*, 179 U. S. 191 (45:148).

³² *Contez v. United States*, 179 U. S. 191 (45:148).

³³ *Contez v. United States*, 171 U. S. 191 (45:148); *Boyd v. State of Nebraska*, 143 U. S. 135 (36:103); *Crane v. Reeder*, 25 Mich. 303; *Desbols' Case*, 2 Mart. 185; *United States v. Loverty*, 3 Mart. 733; *Atty. Gen. v. Detroit*, 78

Mich. 545, 563, 7 L. R. A. 99; *American Ins. Co. v. Canter*, 1 Pet. 511, 542 (7:242); *Elk v. Wilkins*, 112 U. S. 94 (28:643); 7 U. S. Stat. at L. 335, 493; 5 U. S. Stat. at L. 349, 351; 24 U. S. Stat. at L. 388; 8 U. S. Stat. at L. 200, 202; 8 U. S. Stat. at L. 116, 117.

³⁴ 8 U. S. Stat. at L. 116, 117.

³⁵ *Crane v. Reeder*, 25 Mich. 303.

³⁶ 8 U. S. Stat. at L. 200, 202.

of French birth who moved into the territory after the treaty and before the state of Louisiana was formed out of it, became a citizen of the state upon its admission into the union.³⁷ The sixth article of the Treaty of 1819 with Spain³⁸ contained a provision to the same effect as the Treaty of Paris, and in construing it Chief Justice Marshall said: "This treaty is the law of the land, and it admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States."³⁹

§ 234. **Dual citizenship.**—The constitution of the United States, as originally adopted, recognized a dual citizenship, viz.: (1) Citizens of the United States, and (2) citizens of the states, each respectively;⁴⁰ and this distinction is clearly recognized and established in the fourteenth amendment to the constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside." There is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual. A man may be a citizen of the United States without being a citizen of a state; all that is necessary to make him a citizen of the United States is that he should be born or naturalized therein and within the jurisdiction thereof, but to become a citizen of a state he must reside in it, and in that event he is invested with the dual citizenship established by the amendment, being a citizen of both the United States and the state. This dual citizenship arises, logically, out of our dual or complex government. We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the other, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a

³⁷ Desbols' Case, 2 Mart. 185;
United States v. Lovery, 3 Mart.
733.

³⁸ 8 U. S. Stat. at L. 256.

³⁹ American Ins. Co. v. Canter,
1 Pet. 511, 542 (7:242).

⁴⁰ Minor v. Happersett, 21 Wall.
162, 178 (22:627).

state, but his rights of citizenship under one of these governments will be different from those he has under the other.⁴¹

§ 235. The fourteenth amendment added nothing to the rights of citizenship.—The fourteenth amendment did not add to the rights, privileges and immunities of citizens of the United States; it simply furnished an additional guaranty for the protection of such rights, privileges and immunities as the citizen of the union already had and possessed.⁴²

§ 236. Expatriation—Right of declared by federal statute.—An act of congress declares:

“Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.”⁴³

§ 237. Same—Not accomplished by mere declaration of intention.—A mere declaration of an intention to expatriate one's self is not, of itself, sufficient to effect a change of citizenship; and it has, accordingly, been held that a citizen of the United States who has renounced his allegiance to this government, or declared an intention of expatriation, but who has not emigrated to and become a subject or citizen of a foreign kingdom or republic, and who remains domiciliated within the United States, is still a citizen of the United States.⁴⁴

⁴¹ Slaughter-House Cases, 16 Wall. 74 (21:408); United States v. Cruikshank, 92 U. S. 542, 569 (23:588); Minor v. Happersett, 21 Wall. 162, 178 (22:627). 162, 178 (22:627); Slaughter-House Cases, 16 Wall. 36 (21:394); Maxwell v. Dow, 176 U. S. 581, 617 (44:597).

⁴³ U. S. Rev. Stat. sec. 1999.

⁴² Minor v. Happersett, 21 Wall.

⁴⁴ Talbot v. Jansen, 3 Dall. 152.

(d) THE PRIVILEGES AND IMMUNITIES OF THE CITIZENS OF THE SEVERAL STATES.

§ 238. **Complex nature of those rights denominated “privileges and immunities of citizens.”**—An analysis of the decisions of the supreme court of the United States bearing on the subject, will show that the ascertainment, application and enforcement of those rights which are denominated in the constitution as “the privileges and immunities of citizens,” and the distinction between “the privileges and immunities of citizens of the United States,” and the “privileges and immunities of citizens in the several states” are bottomed and proceed upon the following principles, which are shown by a long and unbroken line of decisions, to be political axioms in our system of government, namely:

1. We have in our political system two governments, each distinct from the other, namely: (1) the government of the United States in which is vested the national sovereignty, and (2) a government of each of the several states in which is vested the municipal sovereignty; and these governments are, each, respectively, supreme in the sphere of action assigned to it by the constitution, with the right of final decision in the government of the United States in all cases of conflict of authority between the two governments; and the constitution, laws and treaties of the United States are the supreme law of the land.
2. The citizens of this country are invested with a dual citizenship, namely: (1) They are citizens of the United States and owe them allegiance and are entitled to their protection, and (2) they are citizens of the state in which they reside and owe it allegiance and are entitled to its protection.
3. Every citizen is invested (1) with certain rights, denominated in the constitution as the privileges and immunities of citizens of the United States, and (2) certain rights, denominated in the same instrument as “all the privileges and immunities of citizens of the several states.”
4. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the state, rest alone upon their character and quality as citizens of the national government, and arise out of the nature and essential character of the national government, and are granted or secured by the constitution of the United States.
5. The

privileges and immunities of citizens of the state, as distinguished from the privileges and immunities of citizens of the United States, rest alone upon their character and quality as citizens of the state, and arise out of the nature and essential character of the state government; but the right of "the citizens of each state" to enjoy "all privileges and immunities of citizens of the several states" is protected by the constitution of the United States.⁴⁵

153 (1:549); *The Santissima Trinidad*, 7 Wheat. 283 (5:454). See, also, *Comities v. Parkinson*, 56 Fed. 556, 560; *Ware v. Wisner*, 50 Fed. 312.

⁴⁵ U. S. Const. Art. IV, sec. 2, cl. 1, and XIV, Art. of Amendment, sec. 1; *Slaughter-House Cases*, 16 Wall. 33, 77 (21:394); *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597); *United States v. Cruikshank*, 92 U. S. 542, 569 (23:588); *Minor v. Happersett*, 21 Wall. 162 (22:627); *Re Kemmler*, 136 U. S. 436 (34:519); *Walker v. Sauvinet*, 92 U. S. 90 (23:678); *Paul v. Virginia*, 8 Wall. 180 (19:360); *Ward v. Maryland*, 12 Wall. 430 (20:453); *Bradwell v. Illinois*, 16 Wall. 130 (21:442); *Cole v. Cunningham*, 133 U. S. 107 (33:538); *Blake v. McClung*, 172 U. S. 239 (43:432); *Conner v. Elliott*, 15 How. 591 (15:497); *Corfield v. Coryell*, 4 Wash. 371, Fed. Cas. 3,230. "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection of life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment

by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and are granted or secured by the constitution of the United States." Chief Justice Fuller in *Re Kemmler*, 136 U. S. 436, 448 (34:519).

"We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other.

"Citizens are members of the political community to which they belong. They are the people who compose the community, and who, in their associated cap-

§ 239. Privileges and immunities of citizens not defined in the constitution.—The constitution does not define the privileges and immunities of citizens of the United States, nor those

acity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

“Experience made the fact known to the people of the United States, that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated states. For this reason, the people of the United States, ‘in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty’ to themselves and their posterity, ordained and established the government of the United States, and defined its powers by a constitution, which

they adopted as its fundamental law, and made its rule of action.

“The government thus established and defined is to some extent a government of the states in their political capacity. It is, also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

“The people of the United States resident within any state are subject to two governments: one state and the other national; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad * * *

“The government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to

of the citizens of the states; and for such definition resort must be had to other sources.⁴⁶

§ 240. **Privileges and immunities of citizens defined by judicial inclusion and exclusion only.**—The supreme court has never undertaken to give any exact or comprehensive definition of the words “privileges and immunities of citizens,” as used in the original constitution, and in the fourteenth amendment, but has, by the “gradual process of judicial inclusion and exclusion,” determined, in each case as it has been presented, whether the particular right therein asserted and denied is protected by the constitution as a privilege or immunity of state or national citizenship.⁴⁷ In one case arising under the second section of the fourth article of the constitution, the court said: “We do not deem it needful to attempt to define the meaning of the word ‘privileges,’ in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters, not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.”⁴⁸

§ 241. **History of the words “privileges and immunities of citizens”**—**Colonial charters.**—In all the colonial charters granted by the British crown to the American colonists, except, perhaps, that of Pennsylvania, it was provided that all persons being English subjects and inhabiting the colonies and their children born therein, or on the seas going or returning, should have, possess and enjoy “all liberties, franchises and immuni-

the states or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.” Chief Justice Waite in *United States v. Cruikshank*, 92 U. S. 542, 569 (23:588).

⁴⁶ *Minor v. Happersett*, 21 Wall. 162, 178 (22:627).

⁴⁷ *Conner v. Elliott*, 18 How. 591 (15:497); *Ward v. Maryland*, 12 Wall. 430 (20:453); *Minor v. Happersett*, 21 Wall. 167, 178 (22:627); *Blake v. McClung*, 172 U. S. 239 (43:432).

⁴⁸ *Connor v. Elliott*, 18 How. 591 (15:497).

ties," or "liberties and immunities" or "rights, immunities and privileges" or "privileges and immunities" of free and natural-born subjects of England, as if they were born within the realm of England.⁴⁹

§ 242. **Same—Declaration of rights of 1774.**—In the declaration of rights of 1774, promulgated by the continental congress on behalf of the colonies they declare: "That our ancestors, who first settled these colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England;" and that by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy. And after declaring their right to representation in legislation affecting them "in all cases of taxation and internal polity," and their right to the common law of England and such English statutes, existing at the time of colonization, as were suited to their local circumstances, they further declared that they were "likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."⁵⁰

§ 243. **Same—Provision of the articles of confederation.**—The first section of the fourth article of the articles of confederation declared that: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, imposts and restrictions, as the inhabitants thereof respectively; provided that such re-

⁴⁹ Story, Comm. Const. §§ 42, 63, 71, 87, 122, 129, 143.

The colonial charter of North and South Carolina declared that "the inhabitants and their children, born in the province, should

be denizens of England, and entitled to all the privileges and immunities of British born subjects." (Story, Comm. Const. § 129).

⁵⁰ Pitk. Hist. 235-344.

strictions shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the owner is an inhabitant; provided also, that no imposition, duties or restriction, shall be laid by any state on the property of the United States, or either of them.”⁵¹

§ 244. Privileges and immunities of the citizens of the several states under the constitution.—The constitution as originally adopted declares that: “The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.”⁵² This provision secures valuable rights to the citizens of the several states, and is in effect, a limitation upon the states; it inhibits each state from denying to the citizens of the several other states the privileges and immunities possessed and enjoyed by its own citizens.⁵³

§ 245. Same—Defined by Justice Washington.—This provision of the constitution was first brought under judicial construction in a case in the circuit court in which Mr. Justice Washington, answering the question, what are the privileges and immunities of the citizens of the several states, said:

“We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this union from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus;

⁵¹ 1 U. S. Stat. at L. 4.

⁵² U. S. Const. Art. IV, sec. 2, cl. 1.

⁵³ Paul v. Virginia, 8 Wall. 168, 180 (19:357); Slaughter-House

Cases, 16 Wall. 36, 130 (21:394); Blake v. McClung, 172, 230, 264 (43:432); Ward v. Maryland, 12 Wall. 418, 433 (20:449).

to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the state in which it is to be exercised. These and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old articles of confederation,) the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the union.”⁵⁴

§ 246. **Same—Defined by Justice Field.**—Mr. Justice Field, construing this constitutional provision, said:

“It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states is concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in the other states the equal protection of the laws. It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some such provision of the kind removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the union which now exists.”⁵⁵

⁵⁴ *Corfield v. Coryell*, 4 Wash. (C. C.) 371, Fed. Cas. No. 3,230.

⁵⁵ *Paul v. Virginia*, 8 Wall. 168, 180 (19:357).

§ 247. Same—Defined by Justice Miller.—Mr. Justice Miller, after quoting with approval the definition of Mr. Justice Washington, said: “The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. * * * The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restriction on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.”⁵⁶

§ 248. Same—Commercial equality.—One of the objects of the constitution was to secure commercial equality in each of the states among the citizens of the several states, and, comprehensive as the power of the states is to levy and collect taxes, yet that power cannot be exercised to any extent in a manner forbidden by the constitution; and, inasmuch as the constitution provides that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the citizens of each state may lawfully sell and expose for sale in the several other states any goods which the citizens thereof, respectively, could sell and expose for sale in their respective states without being subjected to any higher tax than that exacted by law of the citizens of the several other states, respectively. And a state statute which prohibits persons not permanent residents in the state from selling, offering for sale, or exposing for sale, within a certain specified district within the state, any goods whatever, other than agricultural products and articles manufactured in the state, without first obtaining from the state and paying therefor a license so to do, is in conflict with the first clause of the second section of the fourth article of the constitution, and, therefore, null and void.⁵⁷

⁵⁶ Slaughter-House Cases, 16 Wall. 36, 130 (21:395).

⁵⁷ Ward v. Maryland, 12 Wall. 418, 433 (20:449).

§ 249. **Same—Equality of right in assets of insolvent debtor.**—When the general property and assets of insolvent individuals, or of a private corporation lawfully doing business in a state, are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the union; and a state statute denying such equality of right to citizens of other states is in conflict with the first clause of the second section of the fourth article of the constitution, and is, therefore, null and void.⁵⁸

§ 250. **Same—Protection of personal liberty.**—Protection of personal liberty by the state government is one of the privileges and immunities of state citizenship, which is secured by the constitution to the citizens of each state in the states in which they reside and also in the several other states; and liberty, in its broadest sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation, subject only to such restraints as the government may justly prescribe for the general good of the whole political community. There can be no liberty, protected by government, that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject only to the restraints necessary to secure the same rights to all others. The fundamental principle upon which liberty is based, in free and enlightened government, is liberty under the law of the land. It has accordingly been everywhere held that liberty, as that term is used

⁵⁸ *Blake v. McClung*, 172 U. S. 239, 269 (43:432); *Sully v. American National Bank*, 178 U. S. 289, 304 (44:1072).

"It is an established rule in equity that when a corporation becomes insolvent it is so far civilly dead that its property may be

administered as a trust fund for the benefit of its stockholders and creditors—not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens." *Blake v. McClung*, *supra*.

in the federal and state constitutions, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare.⁵⁹

§ 251. ~~Same—Same—~~**Liberty of contract.**—The liberty secured to the citizen by the fourteenth amendment embraces the right to make and enter into all lawful contracts which may be proper or necessary or essential to enable him to pursue any lawful trade or calling, and to acquire, hold and sell property; but this right to make and enter into contracts is, like all other rights and liberties, restrained and regulated by law, and must be exercised in subordination to the valid laws and rules established by society for the general welfare. While it may be laid down as a general proposition, that the liberty of contract is an inalienable right of the citizen, yet such right is not absolute, but it is within the undoubted power of both the state

⁵⁹ *Corfield v. Coryell*, 4 Wash. 371, Fed. Cas. 3,230; *Paul v. Virginia*, 8 Wall. 168, 180 (19:357); *Froer v. People*, 141 Ill. 171; *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465; *Goodcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 34 West Va. 179, 25 Am. St. Rep. 863; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 232; *People v. Max*, 99 N. Y. 377, 52 Am. Rep. 34; *Atkin v. Kansas*, 191 U. S. 207, 224 (48:148); *Allgeyer v. Louisiana*, 165 U. S. 578 (41:832); *Williams v. Fears*, 179 U. S. 270 (45:186); *Cargill Co. v. Minnesota ex rel Railroad & W. Com.*, 180 U. S. 452, 470 (45:619); *United States v. Joint Traffic Association*, 171 U. S. 505, 578 (43:288); *Hopkins v.*

United States, 171 U. S. 578, 604 (43:290); *Hooper v. State of California*, 155 U. S. 648, 664 (39:297); *Frisbee v. United States*, 160, 168 (39:657).

"The liberty mentioned in that amendment" (14th) "means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." Mr. Justice Peckham in *Allgeyer v. Louisiana*, *supra*.

and federal governments, each acting within its sphere, to regulate and restrain such right. Liberty of contract does not imply liberty in corporations or individuals to defy the national will when legally expressed; it does not imply liberty in corporations and individuals to defy the will of the state, when legally expressed in the exercise of its reserved powers of municipal sovereignty.⁶⁰

⁶⁰ *Hing v. Crowley*, 113 U. S. 703, 711 (28:1145); *Hooper v. State of California*, 155 U. S. 648, 664 (39:297); *Frisbee v. United States*, 157 U. S. 160, 168 (39:657); *United States v. Joint-Traffic Association*, 171 U. S. 505, 578 (43:259); *Hopkins v. United States*, 171 U. S. 578, 604 (43:290); *Atkins v. Kansas*, 191 U. S. 207, 224 (48:148); *Allgeyer v. Louisiana*, 165 U. S. 578 (41:832); *Williams v. Fears*, 179 U. S. 270 (45:186); *Corgill Co. v. Minnesota ex rel. Railroad & W. Com.*, 180 U. S. 452, 470 (45:619); *Hooper v. State of California*, 185 U. S. 648, 664 (39:279); *Northern Securities Co. v. United States*, 197, 406 (48:679); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 248 (44:136).

"However broad the right of everyone to follow such calling and employ his time as he may judge most conducive to his interests, it must be subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty which is guarantied to each. It is liberty regulated by just and impartial laws. Parties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing and what may

be verbally made, and on what days they may be executed, and how long they may be enforced if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of a contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the states." Mr. Justice Field in *Hing v. Crowley*, *supra*.

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individ-

§ 252. **Same—Corporations not citizens within the meaning of this constitutional provision.**—It has long been settled that, for the purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the state creating such corporation, and that therefore the corporation is to be deemed, for such purposes, a citizen of the state under whose laws it was created and organized. But it is equally well settled, that a corporation is not a citizen within the meaning of the constitutional provision that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”⁶¹ A state may lawfully prohibit a corporation of another state from participating upon terms of equality, with local creditors in the distribution of the assets of an insolvent individual or corporation in the hands and custody of its courts;⁶² and it may require an insurance company incorporated in another state to take out a license before doing business within its jurisdiction, and also to make a deposit for the security of its policy-holders.⁶³ In the case last cited, Field, Justice, delivering the opinion of the court, said: “But in no case which has come under our observation, either in the state or federal courts has a corporation been considered a citizen within the meaning of that provision of the constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the sev-

uals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by the government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the

price of his labor, services or property.” Mr. Justice Brewer in *Frisbie v. United States*, *supra*.

⁶¹ *Blake v. McClung*, 172 U. S. 239, 269 (43:432); *Paul v. Virginia*, 8 Wall. 168, 178 (19:357); *Ducat v. Chicago*, 10 Wall. 410 (19:972); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566 (19:1029); *Perubina Con. Silver Mining Co. v. Pennsylvania*, 123 U. S. 181, 190 (31:650); *R. Co. v. Pennsylvania*, 136 U. S. 114 (34:394).

⁶² *Blake v. McClung*, 172 U. S. 239, 269 (43:432).

⁶³ *Paul v. Virginia*, 8 Wall. 168, 178 (19:357).

eral states." And, after defining "privileges and immunities," he continued, saying: "But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given. Now, a grant of corporate existence is a grant of special privileges to the corporators enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created."

And it is also held in a recent case, by the supreme court of the United States, that a corporation is not a citizen within the provision of the fourteenth amendment, which declares that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁶¹

§ 253. Same—Common property of the state—Fisheries.—Each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away, and in like manner owns the tide-waters themselves, and the fish in them, so far as they are capable of ownership as they run; and for this purpose, and in this dominion over the tide-beds and tide-waters and fisheries, the state represents its people, and the ownership is that of the people in their united sovereignty. The right to plant, cultivate and take oysters in the tide-waters and tide-beds is in the exclusive control of the state, which has the right in its discretion to appropriate its tide-waters and tide-beds to be used by its people as a common for planting, cultivating and taking oysters, so far as it may be done without obstruct-

⁶¹ *Western Turf Asso. v. Greenberg*, 204 U. S. 359-364 (51:520).

ing navigation, and such appropriation is, in effect, nothing more than a regulation of the use by the people of their common property; and the right which the people of the state acquire by such appropriation comes not from their citizenship alone, but from their citizenship and property combined, and is in fact a property right, and not a mere privilege or immunity of citizenship, and, for this reason, and upon this principle, the citizens of one state are not vested with the right by the constitution to plant, cultivate and take oysters in the tide-waters and tide-beds of another state.⁶⁵

§ 254. **Same—Marital rights.**—According to the express words and clear meaning of the first clause of the second section of the fourth article of the constitution, no privileges are secured by it, except those which belong to citizenship, and rights attached by law to marital contracts by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed privileges of a citizen within the meaning of the constitution; and a widow, who was married to her deceased husband in the state of Mississippi, and who resided there with him during the continuance of their marital relation, is not invested by this clause of the constitution with those marital rights, in a plantation acquired by her husband, during the continuance of the marriage, in the state of Louisiana, given by the laws of that state to a married woman whose marriage with her husband was contracted there, or who resided there with her husband in the marital relation after it was created.⁶⁶

⁶⁵ *McCready v. Virginia*, 94 U. S. 391 (24:248); *State v. Towler*, 84 Me. 445, 24 Atl. 899.

"The planting of oysters in the soil covered by water owned in common by the people of the state is not different in principle from that of planting corn on dry land held in the same way. Both are for the purposes of cultivation and profit; and if the state, in the regulation of its public domain, can grant its own citizens the exclusive use of dry lands, we see no

reason why it may not do the same thing in respect to such as are covered with water. And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone." Chief Justice Waite in *McCready v. Virginia*, *supra*.

⁶⁶ *Conner v. Elliott*, 18 How. 591, 594 (15:497).

§ 255. Same—Statute of limitation not running in favor of party out of the state.—A state statute of limitations containing a provision that when the defendant is out of the state, the limitation shall not run against the plaintiff if he resides in the state, but shall if he resides out of the state, does not deny to the non-resident plaintiff in such a case any privilege or immunity of a citizen secured by the constitutional provision declaring that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”⁶⁷

§ 256. Same—Intention of the constitutional provision.—The intention of the first clause of the second section of the fourth article of the constitution was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances.⁶⁸

(e) THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES NOT TO BE ABRIDGED.

§ 257. Privileges and immunities of citizens of the United States protected by the fourteenth amendment.—Limitation upon the states.—In the first section of the fourteenth amendment to the constitution of the United States, it is declared that: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” This provision is, of course, a limitation upon the states; it is directed against state action. It was not intended to protect individual right against individual invasion. It restrains and annuls all state legislation and state action of every kind which abridges the privileges or immunities of citizens of the United States.⁶⁹ Corporations are not citizens within the meaning of this provision, and cannot claim its benefit.⁷⁰

§ 258. Privileges and immunities of citizens of the United States partially enumerated by the supreme court.—The su-

⁶⁷ Chemung Canal Bank v. Lowry, 93 U. S. 72, 78 (23:806).

⁶⁸ Cole v. Cunningham, 133 U. S. 107, 138 (33:538).

⁶⁹ Civil Rights Cases, 109 U. S. 3, 62 (27:836); Ex parte Commonwealth of Virginia, 100 U. S. 313,

338 (25:667); Slaughter-House Cases, 16 Wall. 36 (21:394); United States v. Cruikshank, 92 U. S. 542 (23:588).

⁷⁰ Western Turf Asso. v. Greenberg, 204 U. S. 359-364 (51:520).

preme court of the United States, without attempting to give a comprehensive definition of the privileges and immunities of citizens of the United States, and without assuming to state them all, has made a partial enumeration of them, which is sufficient to indicate the character of those rights which are protected by the constitutional inhibition under consideration. The court, in its decisions has mentioned the following: A citizen of the United States, as such, has the right to come to the seat of the government to assert claims or transact business, to seek the protection of the government or share its offices; he has the right of free access to its seaports, its various offices throughout the country, and to the courts of justice in the several states; to demand the care and protection of the general government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government; the right, with others, to peaceably assemble and petition for a redress of grievances; the right to the writ of habeas corpus; to use the navigable waters of the United States, however they may penetrate the territory of the several states; also all rights secured to our citizens by treaties with foreign nations; the right to become citizens of any state in the union by a *bona fide* residence therein, with the same rights as other citizens of that state; and the rights secured to him by the thirteenth and fifteenth amendments to the constitution.⁷¹

⁷¹ Slaughter-House Cases, 16 Wall. 36 (21:394); Maxwell v. Dow, 176 U. S. 581, 617 (44:597); Crandall v. Nevada, 6 Wall. 36 (18:745).

"Living as we do under a common government, charged with the great concerns of the whole union, every citizen of the United States, from the remotest states or territories, is entitled to free access, not only to the principal departments established at Washington, but also its judicial tribunals and public offices in every state and territory of the Union. And the various provisions of the

constitution of the United States—such for example, as the right to sue in a federal court sitting in another state, the * * * equal privileges and immunities secured to citizens of other states, and the provisions that vessels bound to or from one state to another shall not be obliged to enter and clear or pay duties—all prove that it intended to secure the freest intercourse between the citizens of the different states. For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the

§ 259. **What are not privileges and immunities of citizens of the United States—Right to vote.**—The right to vote is not a privilege or an immunity of national citizenship; the constitution of the United States has not conferred the right of suffrage upon any one; the right of suffrage is not a necessary attribute of national citizenship.⁷²

§ 260. **Same—Right to practice law in state courts.**—The right to practice law in the state courts is not a privilege or an immunity of a citizen of the United States; the right to control and regulate the granting of license to practice law in the courts of the state is one of those powers that was not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by reason of the fact that the party seeking such license is a citizen of the United States.⁷³

§ 261. **Same—Right to sell intoxicating liquors.**—The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship.⁷⁴ The fourteenth amendment does not take

United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states. And a tax imposed by a state for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other states as members of the union, and with the objects which that union was intended to attain. Such a power in the states would produce nothing but discord and mutual irritation, and they very clearly do not possess it." Chief Justice Taney, dissenting opinion in *Passenger Cases*, 7 How. 492 (12:790), cited with approval by Mr. Justice Miller in

Crandall v. Nevada, 6 Wall. 36 (18:745), and also in *Slaughter-House Cases*, 16 Wall. 36 (21:394).

⁷² *Minor v. Happersett*, 21 Wall. 178 (22:631); *United States v. Cruikshank*, 92 U. S. 542, 569 (23:588); *United States v. Reese*, 92 U. S. 214, 256 (23:563); *Pope v. Williams*, 193 U. S. 621, 634 (48:817).

⁷³ *Browell v. Illinois*, 16 Wall. 130 (21:442); *Ex parte Lockwood*, 154 U. S. 116, 118 (38:926); *Philbrook v. Newman*, 85 Fed. 142.

⁷⁴ *Giozza v. Tiernan*, 148 U. S. 657, 662 (37:599); *Bartemeyer v. Iowa*, 18 Wall. 129 (21:929); *Mugler v. Kansas*, 123 U. S. 623, 678 (31:205).

from the states those powers of police which were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order.⁷⁵

§ 262. Same—State statute prohibiting the carrying of dangerous weapons.—A state statute prohibiting persons from carrying dangerous weapons on the person does not abridge the privileges or immunities of citizens of the United States.⁷⁶

§ 263. Same—State laws requiring separation of the races on railway trains.—A state statute which requires all railway companies carrying passengers in their coaches in that state to provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each train, or by dividing the passenger coaches by partition so as to secure separate accommodations, and providing that no person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race to which they belong, and giving to the officers in charge of such passenger trains the power, and requiring them to assign each passenger to the coach or compartment used for the race to which he belongs, and enforcing the provisions of the act by penal sanction, does not deprive persons of the African race of the privileges and immunities of citizens of the United States.⁷⁷

§ 264. Same—State statute regulating the slaughter of animals.—A state statute, establishing regulations for the landing, yarding, inspection and slaughter of all animals shipped into a

⁷⁵ *Barbier v. Connolly*, 113 U. S. 27, 31 (28:923); *Re Kemmler*, 136 U. S. 436 (34:519); *Giozza v. Tiernan*, 148 U. S. 657, 662 (37:599).

⁷⁶ *Miller v. Texas*, 153 U. S. 535, 539 (38:812).

⁷⁷ *Plessy v. Ferguson*, 163 U. S. 537, 564 (41:256).

"The object of the amendment was undoubtedly to enforce the ab-

solute equality of the two races before the law, but in the nature of things it could not have been intended to abolish the distinction based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Brown, Justice. in Plessy v. Ferguson, supra.*

designated district, whose flesh is designed for food in such district, and creating a private corporation, and granting it the exclusive privilege of maintaining stock-landings, stock-yards and slaughter-houses within such district for a period of years, and requiring that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the corporation, and nowhere else, and fixing maximum charges for all animals so landed or slaughtered, to be paid by the owners to the incorporated company, does not abridge the privileges or immunities of citizens of the United States. The enactment by a state of a statute regulating the landing, inspection and slaughter of animals for food, and the inspection of the meat after slaughter, is but the exercise by the state of the police power which was reserved to the states when the constitution was originally adopted, and which has not been surrendered by them, by the fourteenth amendment, or any other amendment.⁷⁸

§ 265. **Same—State judicial procedure.**—It has been contended, on writ of error in the supreme court of the United States, and urged as ground of reversal, by persons convicted of crime in state courts, that the limitations imposed by the first ten amendments to the federal constitution on the federal courts, in regard to judicial procedure, were, by the operation of the fourteenth amendment, extended to the states, and restrict the states to the judicial procedure prescribed for the federal courts in the first ten amendments, and that the guaranties therein contained in regard to judicial procedure have become, by force of the fourteenth amendment, privileges and immunities of citizens of the United States, which no state can abridge or deny. In other words, it has been contended that the forms and methods of judicial procedure prescribed by the first ten amendments for the federal courts, were, by the fourteenth amendment, converted into privileges and immunities of all the citizens of the United States, and that they are entitled to that identical procedure in all criminal prosecutions against them in the courts of the several states.⁷⁹ But

⁷⁸ *Slaughter-House Cases*, 16 U. S. 581, 617 (44:597); *McElvaine v. Brush*, 142 U. S. 155, 160 Wall. 36, 130 (21:395).

⁷⁹ *Spies v. Illinois*, 123 U. S. 131, (30:971).
136 (31:80); *Maxwell v. Dow*, 176

that contention has been explicitly overruled by the supreme court, and the following points determined:

(1) Exemption from trial, in a state court and upon state authority, for an infamous crime, except on a presentment or indictment of a grand jury, as required in the federal courts by the fifth amendment to the federal constitution, is not made by the fourteenth amendment a privilege or immunity of citizens of the United States; and a prosecution of a citizen of the United States, in a state court and upon state authority, for an infamous crime, upon an information filed against him by the proper law officer of the state, in accordance with the constitution and laws of such state, does not abridge the privileges or immunities of such citizen of the United States, and does not deny to him any right secured to him by the federal constitution.⁸⁰

(2) Exemption from trial, in a state court and upon state authority, in a criminal prosecution, except by a common law jury of twelve men, as required in the federal courts by the sixth amendment to the constitution, is not made by the fourteenth amendment a privilege or immunity of citizens of the United States; and a trial of a citizen of the United States, in a state court and upon state authority, on a criminal charge, by a jury of less than twelve men, in accordance with the constitution and laws of such state, does not abridge the privileges or immunities of such citizen of the United States, and does not deny to him any right secured to him by the federal constitution.⁸¹

(3) Exemption from capital execution by electricity under the New York statute, of a person who has been duly convicted of a capital offense under the laws of that state, is not a privilege or immunity of a citizen of the United States.⁸²

§ 266. Same—Same—Jury in civil cases.—A trial by jury in a civil suit at common law in the state courts is not a privilege or an immunity of national citizenship, which the states are by the fourteenth amendment forbidden to abridge.⁸³

⁸⁰ Maxwell v. Dow, 176 U. S. 581, 617 (44:597).

⁸¹ Maxwell v. Dow, 176 U. S. 581, 617 (44:597).

⁸² McElvaine v. Brush, 142 U. S.

155, 160 (30:971); Re Kemmler, 136 U. S. 436 (34:519).

⁸³ Walker v. Sauvenet, 92 U. S. 90, 93 (23:678); State v. Saunders, 66 N. H. 88, 25 Atl. 595, 18 L. R. A. 656.

§ 267. **Same—Same—Form of action in civil cases.**—The fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. These being secured, it is not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of another. And it is not a denial of a right protected by the federal constitution to refuse a trial by a jury, even though it were erroneous to construe the law of the state as justifying the refusal.⁸⁴

§ 268. **Corporations not citizens within the meaning of the constitutional provision.**—A corporation is not a citizen within the meaning of the second clause of the first section of the fourteenth amendment to the constitution, which declares that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁸⁵

(f) NO STATE TO DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW.

§ 269. **The “due process of law” of the state—Meaning of the constitutional limitation.**—The third clause of the first section of the fourteenth amendment to the constitution declares: “Nor shall any state deprive any person of life, liberty, or property, without due process of law.” This is a limitation upon the states; it is a prohibition upon state action, legislative, executive and judicial.⁸⁶ The fifth amendment to the constitution declares that “no person” shall “be deprived of life, liberty, or property, without due process of law;” but

⁸⁴ *Iowa Central Railway Co. v. Iowa*, 160 U. S. 389, 394 (40:467). Rights Cases, 109 U. S. 3, 62 (27:836); *Ex parte Commonwealth of Virginia*, 100 U. S. 313, 338 (25:667); *Slaughter-House Cases*, 16 Wall. 36 (21:394); *United States v. Cruikshank*, 92 U. S. 542 (23:588).

⁸⁵ *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 567 (43:552); *Blake v. McClung*, 172 U. S. 239 (43:432).

⁸⁶ *Hurtado v. California*, 110 U. S. 516 (28:332); *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597); *Civil*

that amendment is a limitation upon the federal government, and is in no respect a restraint upon the states; it is a prohibition upon federal action alone.⁸⁷ Regarding these provisions of the constitution, the following propositions are established by the adjudicated cases⁸⁸ upon the subject, viz.: (1) "Due process of law" in the fifth amendment to the constitution means that law of the land, which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. (2) "Due process of law" in the fourteenth amendment to the constitution means that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. (3) Any legal proceeding or judicial procedure, enforced by the authority of a state, in accordance with its constitution and laws, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power of the state, in furtherance of the general public good, which regards and preserves those principles of liberty and justice which lie at the base of all our civil and political institutions, must be held to be due process of law. (4) The fourteenth amendment to the constitution was not intended to establish a uniform system of judicial

⁸⁷ *Brown v. New Jersey*, 175 U. S. 172, 177 (44:119), and authorities cited.

⁸⁸ *Hurtado v. California*, 110 U. S. 516, 558 (28:232); *McNulty v. California*, 149 U. S. 648 (37:883); *Hodgson v. Vermont*, 168 U. S. 262, 273 (42:461); *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597); *Holden v. Hardy*, 169 U. S. 366 (42:780); *Brown v. New Jersey*, 175 U. S. 172, 177 (44:119); *Bolln v. Nebraska*, 176 U. S. 83, 92 (44:382); *Walker v. Sauvinet*, 92 U. S. 90 (23:678); *Kennard v. Louisiana*,

92 U. S. 480 (23:478); *Bowman v. Lewis*, 101 U. S. 22 (25:989); *Re Converse*, 137 U. S. 624 (34:796); *Caldwell v. Texas*, 137 U. S. 692 (34:816); *Leeper v. Texas*, 139 U. S. 462 (35:225); *Davidson v. New Orleans*, 96 U. S. 97 (24:616); *McMullen v. Anderson*, 95 U. S. 37, 42 (24:335); *Hager v. Reclamation District*, 111 U. S. 701 (28:569); *Giozza v. Tiernan*, 148 U. S. 657 (37:599); *Vincent v. California*, 149 U. S. 648 (37:884); *Duncan v. Missouri*, 152 U. S. 377 (38:485).

procedure in the several states, nor to guaranty any particular forms of procedure, but to guaranty the very substance of individual rights to life, liberty and property, leaving each state to prescribe its own modes and forms of judicial procedure.

(5) The fourteenth amendment forbids any arbitrary deprivation, by a state, of life, liberty, or property, and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the state to protect the lives, liberty and property of the citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state. (6) The powers of the states to deal with crime within their borders is not limited by the fourteenth amendment, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; and law, in its regular course of administration through courts of justice is, within the meaning of the fourteenth amendment, due process of law, and when secured by the law of the state the constitutional requirement is satisfied; and due process of law is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the fundamental principles of private right and distributive justice. (7) Protection to life, liberty and property rests, primarily, with the states, and the fourteenth amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure.

§ 270. Same—The states control their own judicial procedure—Law a progressive science.—In passing upon state legislation alleged to be in conflict with the due process clause of the fourteenth amendment to the constitution of the United States, the supreme court of the union has recognized the rational principle that the law is a progressive science, ever unfolding and expanding to meet the varying conditions and exigencies of advancing civilization, and that, while the cardinal principles of liberty and justice are immutable, the methods and procedure by which justice is administered are flexible and subject to constant change and readjustment; and, in con-

sonance with this philosophical principle of law and government, it is settled by the decisions that the several states of the union are not tied down by the fourteenth amendment, nor by any other provision of the federal constitution, to the judicial procedure which existed at the common law, nor to the judicial procedure which has existed at any time in their own judicial systems, but each state has full control over the procedure in its own courts, both criminal and civil, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the federal constitution, and, subject to this limitation, may avail itself of the wisdom gathered by the experience of the century and the growth and development of legal science, to make such changes in its methods of procedure, as its people, through their legislature, may deem necessary or appropriate for the conservation of their interests and the promotion of their welfare.⁸⁹

⁸⁹ *Hurtado v. California*, 110 U. S. 516, 558 (28:232); *Holden v. Hardy*, 169 U. S. 366, 398 (42:780); *Brawn v. New Jersey*, 175 U. S. 172, 177 (44:119).

"The concessions of Magna Charta were wrung from the king as guaranties against the oppressions and usurpations of his prerogatives. It did not enter into the minds of the barons to provide security against their own body or in favor of the commons by limiting the power of parliament; so that bills of attainder, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were not regarded as inconsistent with the law of the land; for, notwithstanding what is attributed to Lord Coke in *Bonham's Case*, the omnipotence of parliament over the common law was absolute, even against common right and reason. The actual and practical security for English

liberty against legislative tyranny was the power of a free public opinion represented by the commons.

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive interpre-

§ 271. Same—First ten amendments no restraint on the states.—The first ten amendments to the federal constitution contain no restraints on the powers of the states, but were intended to operate solely on the federal government, and their operation was not extended by the fourteenth amendment to the states. It has been contended on writ of error from the supreme court of the United States to the highest courts of the state, in many cases, civil and criminal, that the adoption of the fourteenth amendment had the effect to extend the operation of the first ten amendments to the states, and that all the restraints therein imposed upon the federal government have become restraints on the powers of the states, and that they can adopt no form of judicial procedure, nor make any thing “due process of law,” except those forms of procedure which are allowed and permitted by the first ten amendments; but this contention has been overruled and repudiated by the supreme court in every case, criminal and civil, in which it has been presented.⁹⁰

tation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights of life, liberty and property.

“Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws, that violated express and specific injunctions and prohibitions, might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public

will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke’s, ‘may alter the mode and application, but have no power over the substance of original justice.’” Matthews, Justice, in *Hurtado v. California*, 110 U. S. 516, 558 (28:232).

⁹⁰ *Brown v. New Jersey*, 175 U. S. 172, 177 (44:119) and authorities cited; *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597); *Hurtado v. California*, 110 U. S. 516 (28:232); *Bolln v. Nebraska*, 176 U. S. 83, 92 (44:382); *Hodgson v. Vermont*, 168 U. S. 262, 273 (42:461); *McNulty v. California*, 149 U. S. 648 (37:883); *Vincent v. California*, 149 U. S. 648 (37:884).

§ 272. Same—Same—Criminal prosecution upon information.—The criminal prosecution of a person in a state court, for a capital or other infamous crime, without indictment or presentment by a grand jury, upon an information made and filed by the duly authorized law officer of the state, in conformity with the constitution and laws of the state, resulting in his conviction, followed by the death sentence, does not deprive such person of his life without due process of law, nor of any right secured to him by any provision of the federal constitution or any amendment thereof.⁹¹

§ 273. Same—Same—Criminal trial by a jury of less than twelve men.—The trial in a state court of a person charged with an infamous crime by a jury of less than twelve men, and his conviction by such jury, and sentence to the state penitentiary, followed by execution of the sentence, in accordance with the constitution and laws of the state, do not deprive such person of his liberty without due process of law, nor of any right secured to him by any provision of the federal constitution or any amendment thereof.⁹²

⁹¹ *Hurtado v. California*, 110 U. S. 516 (28:232); *Bolln v. Nebraska*, 176 U. S. 83, 92 (44:382); *Hodgson v. Vermont*, 168 U. S. 262, 273 (42:461); *McNulty v. California*, 149 U. S. 648 (37:883); *Vincent v. California*, 149 U. S. 648 (37:884); *Davis v. Burke*, 179 U. S. 399 (45:249).

⁹² *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597).

"It appears to us that the question whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each state for themselves, and do not come within the clause of the amendment" (the due process clause of the four-

teenth amendment) "under consideration, so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado* case, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same na-

§ 274. Same—Same—Capital execution by electricity.—The capital execution of a person by electricity, under and by virtue of the laws of a state, who has been duly and legally convicted of a capital crime in a court of the state, and in accordance with its constitution and laws, does not deprive such person of his life without due process of law, nor of any right secured to him by any provision of the federal constitution or any amendment thereof.⁹³

§ 275. Same—Same—Confronting accused with witnesses.—The admission in evidence, against a person on trial, for an infamous crime, in a state court, of the deposition of a witness taken at the examining trial in the presence of the accused who then had an opportunity to cross-examine him, when it is shown that at the time of the trial the witness was a non-resident of the state and permanently absent and his attendance could not be procured, does not deny the accused due process of law, nor of any right secured by the federal constitution, where such deposition is admissible under the law of the state

ture, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the states respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indict-

ment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the federal government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown v. New Jersey* (175 U. S. 172), the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution." Peckham, Justice, in *Maxwell v. Dow*, 176 U. S. 581, 617 (44:597).

⁹³ *Re Kemmler*, 136 U. S. 436 (34:519); *McIlvaine v. Brush*, 142 U. S. 155 (35:971).

⁹⁴ *West v. Louisiana*, 194 U. S. 258, 267 (48:965).

as declared by its highest court.⁹⁴ At common law, the right existed to read a deposition upon the trial of the defendant, if such deposition had been taken when the defendant was present and when the defendant's counsel had an opportunity to cross-examine, upon proof being made to the satisfaction of the court that the witness was, at the time of the trial, dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant.⁹⁵

§ 276. Same—Same—Unreasonable searches and seizures—Evidence.—The fact that papers and other subjects of evidence, such as gambling paraphernalia and other instruments of crime, may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, is no valid objection to their admissibility if they are pertinent to the issue. Evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of an admission made under duress or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued. If a search warrant be illegally issued, or if the officer serving it exceed his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this would be no good reason for excluding from evidence papers seized, if they are pertinent to the issue. When papers are offered in evidence, the court can take no notice as to how they were obtained, whether lawfully or unlawfully, nor form a collateral issue to determine that question. Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even in an illegal, manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, or perhaps criminally, but his testimony is not thereby rendered incompetent.⁹⁶ Due process of law is not

⁹⁴ *West v. Louisiana*, supra.

⁹⁶ *Adams v. New York*, 192 U. S. 585 (48:575); *Commonwealth v. Dana*, 2 Met. 329; *Lagett v. Tollervy*, 14 East, 302; *Jordan v.*

Lewis, 14 East, 306; *Commonwealth v. Tibbetts*, 157 Mass. 519; *Commonwealth v. Acton*, 165 Mass. 11; *Commonwealth v. Smith*, 166 Mass. 730; *Chastang v. State*, 83

denied by the New York statute which provides that: "The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share, or interest in numbers sold, drawn, or to be drawn, or in what is commonly called policy, or in the nature of a bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers, or device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting, or playing the game commonly called policy, is presumptive evidence of possession thereof knowingly and in violation of a further statutory provision of the state for the violation of which a heavy penalty is imposed; nor is due process of law denied by the admission in evidence of documents seized under a search warrant not authorizing them to be seized, but which was issued for the seizure of certain gambling paraphernalia."⁹⁷

§ 277. **Same—Same—Trial without jury in civil cases.**—The seventh amendment to the federal constitution, providing that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," relates only to trials in the courts of the United States; and the states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. The states are forbidden by the fourteenth amendment to deprive any person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of a person must be by jury. The requirement of the fourteenth amendment is met, if the trial is had according to the settled course of judicial proceedings in the state. Due process of law is process due according to the law of the land; and this process in the states is regulated by the law of the state, and the power of the United

Ala. 29, 3 So. Rep. 304; *State v. Flynn*, 36 N. H. 64; *State v. Edwards*, 51 W. Va. 220, 59 L. R. A. 465, 41 S. E. 429; *Shields v. State*, 104 Ala. 35, 16 So. Rep. 85; *Bacon v. United States*, 38 C. C. A. 31, 79 Fed. Rep. 35; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021; *Williams v. State*, 100 Ga. 511, 39 L. R.

A. 269, 28 S. E. 624; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940.
⁹⁷ *Adams v. New York*, 192 U. S. 585 (48:575).

States supreme court over that law is to determine whether it is in conflict with the law of the land.⁹⁸

§ 278. Same—Same—Contempts tried without a jury.—A jury trial is not necessary to due process of law on an inquiry for a contempt of court; and the constitution and laws of a state denying a jury trial in such cases are not in conflict with that provision of the fourteenth amendment to the federal constitution which inhibits the states from depriving any person of life, liberty, or property, without due process of law. In proceedings for contempt at common law, the accused was not entitled to trial by jury; it has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have the power of vindicating its dignity, of enforcing its orders, or protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.⁹⁹

§ 279. Same—Same—Form of action or proceedings.—The due process clause of the fourteenth amendment to the federal constitution does not control mere forms of procedure in state courts, nor regulate the practice therein; all the requirements of the constitutional provision are complied with, if, in the proceedings which are claimed not to be due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. Due process does not require that the action or proceedings in a state court shall conform to any particular mode or form, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it; and if the essential requisites of full notice and an opportunity to defend are complied with in the state court, the United States supreme court will, upon writ of error, accept the interpretation given by the state court as to the regularity, under the state statute, of the practice pursued in the particular case.¹ The fact that a proceeding to condemn

⁹⁸ Walker v. Sauvenet, 92 U. S. 90, 93 (23:678); Edwards v. Elliott, 21 Wall. 557 (22:492); Church v. Kelsey, 121 U. S. 282, 284 (30:960).

⁹⁹ Eilenbecker v. District Court of Plymouth County, Iowa, 134 U.

S. 31, 40 (33:801); Tinsley v. Anderson, 171 U. S. 101, 108 (43:91); Telegram Co. v. Commonwealth, 172 Mass. 298, 70 Am. St. Rep. 284, 52 N. E. 446, 44 L. R. A. 161.

¹ Louisville & Nashville R. Co. v. Schmidt, 177 U. S. 230, 239 (44:

a party to pay a judgment rendered in a cause to which he was not a party and in which he was not served with process, is by rule to show cause, does not deprive the proceeding of the character of due process.²

§ 280. **Same—Same—Notice.**—In a suit to foreclose a vendor's lien on land, within the state, personal service of notice of the suit upon a non-resident defendant outside the jurisdiction of the court, is sufficient to constitute due process of law, so far as the foreclosure of the lien is concerned; but five days' notice in such case, where the distance between the place of service and the place of return required four days constant travel to reach the court, giving the party but one day, and that a Sunday, to make preparation to comply with the exigencies of the notice, with no estimated allowance of time for accidental delays in transit, is not sufficient to constitute reasonable notice or due process of law.³ A personal judgment rendered against a non-resident defendant upon constructive service by publication, and without the appearance of the defendant, is void for want of due process of law.⁴

§ 281. **Same—Eminent domain.**—All private property is held subject to the demands of public use, and the constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise; and the due process clause of the fourteenth amendment does not make it essential that the assessment of the damages in a state court be made by a jury.⁵ Since the adoption of the fourteenth amendment to the federal constitution, compensation for private property taken by the state for public use constitutes an essential element in due process of law, and, without such compensation made or secured to the owner, the appropriation of private

747); *Wilson v. North Carolina*, 169 U. S. 586 (42:865); *Simon v. Craft*, 182 U. S. 427 (45:1165); *Iowa C. R. Co. v. Iowa*, 160 U. S. 389 (40:467).

² *Louisville & Nashville R. Co. v. Schmidt*, 177 U. S. 230, 239 (44:747).

³ *Roller v. Holly*, 176 U. S. 398, 413 (44:520).

⁴ *Pennoyer v. Neff*, 95 U. S. 714, 748 (24:565); *Ins. Co. v. Bangs*,

103 U. S. 441 (26:582); *Davis v. Wakelee*, 156 U. S. 685 (39:583); *St. Clair v. Cox*, 106 U. S. 353 (27:224); *Brown v. Campbell*, 100 Cal. 641, 38 Am. St. Rep. 317; *Maddox v. Craig*, 80 Tex. 602; *York v. State*, 73 Tex. 654.

⁵ *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (41:1165); *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (42:853).

property to public use, no matter under what form of procedure it is taken, would violate this provision of the federal constitution; and it is a condition precedent to the exercise of the power of eminent domain by the state and its agencies, that the state statutes make provision for reasonable compensation to the owner.⁶ The mode of exercising the right of eminent domain, by a state, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature.⁷ Due process of law as applied to judicial proceedings instituted for the taking of private property for public use, means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public; the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.⁸

§ 282. Same—Same—Whether taking is for a public use presents a federal question.—Whether or not a taking of private property in the exercise of the power of eminent domain under the constitution and laws of a state, is a taking for a public use, presents a federal question, when the claim is duly made, under the due process clause of the fourteenth amendment to the constitution; and the supreme court of the United States, while according great respect and weight to the decisions of the highest court of the state in the construction of its own constitution and laws upon the subject, will deter-

⁶ *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 263 (41:979); *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166 (20:557); *Searl v. Lake County School Dist.*, 133 U. S. 553 (33:740); *Sweet v. Rechel*, 159 U. S. 380 (40:188); *Scott v. Toledo*, 36 Fed. 385; *Henderson v. Central Pass. R. Co.*, 21 Fed. 359; *Baker v. Norwood*, 74 Fed. 997; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (41:1165); *Norwood v. Baker*, 172 U. S. 269 (43:443).

⁷ *Secombe v. Ry. Co.*, 23 Wall. 108, 119 (23:67).

⁸ *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 263 (41:979).

It is held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation is an incident to the exercise of the power of eminent domain; and that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle. *Sinnickson v. Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184.

mine the question for itself.⁹ If the legislature of a state, assuming to act in the exercise of the power of eminent domain, enacts legislation which, as construed by the highest court of the state, is in conflict with the federal constitution or with any valid act of congress, it is the duty of the courts of the United States, in any proper case presenting the question, to so decide, and to thus enforce the provisions of the federal constitution; but if such legislation do not violate any provision, expressed or properly implied, of the federal constitution, there is no justification for the federal courts to run counter to the decisions of the highest courts of the state upon questions involving the construction of the state statutes or constitution, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law.¹⁰ Where the record does not show that the question, whether the condemnation statute of the state is in conflict with the federal constitution, was raised in either the trial court or the supreme court of the state, and was passed on by either the one or the other of those courts, no federal question is presented, and the supreme court of the United States has no jurisdiction to review the judgment of the state court.¹¹

⁹ Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 179 (41:369).

"There is no specific prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation made, applies only to the federal government, as has many times been decided. In the fourteenth amendment the provision regarding the taking is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the

citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way, the question whether private property has been taken for a public use becomes material in this court, even where the taking is under the authority of the state instead of the federal government." Peckham, Justice, in Fallbrook Irrigation Dist. v. Bradley, supra.

¹⁰ Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 179 (41:369).

¹¹ Hooker v. Los Angeles, 188 U. S. 314, 321 (47:487).

§ 283. Same—Same—Taking for private use.—The taking by the state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the due process clause of the fourteenth amendment; and the order of a state board of transportation, acting under and in accordance with the laws thereof, requiring a railroad company to grant to certain private persons named the right and privilege of erecting and maintaining upon its grounds and adjacent tracks, at a point specified in the order, or at some other suitable and convenient place, at a station named, an elevator and all and equal facilities for the handling and shipping of grain at that station, which it had granted to other shippers of grain there, and to cease from all discrimination or preferences to and of shippers and operators of elevators at that station, is, so far as it required the railroad company to surrender a part of its land to the parties applying for it, for the purpose of building and maintaining their elevator upon it, a taking of the private property of the railroad company for the private use of the parties seeking its use, and, therefore, in conflict with the fourteenth amendment, and void.¹² A railroad corporation holds its station grounds, tracks, and right of way, as its private property, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as free and safe passage is left for the carriage of freight and passengers, and cannot be compelled to grant, against its consent, to private persons the right to build and maintain upon its right of way or other grounds permanent structures for receiving and shipping freight.¹³

§ 284. Same—Same—State laws fixing destructive rates for common carriers.—It is the settled law that corporations are persons within the meaning of the clause of the fourteenth amendment to the constitution forbidding the deprivation of property without due process of law;¹⁴ and state legislation establishing a tariff of rates for the carriage of freight and

¹² *Missouri Pacific R. Co. v. Nebraska*, 164 U. S. 403, 417 (41: 489).

¹³ *Missouri Pacific R. Co. v. Nebraska*, 164 U. S. 403, 417 (41:

489); *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454 (23:356).

¹⁴ *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394 (30: 118); *Mining Co. v. Pennsylvania*,

passengers which is so unreasonable as to practically destroy the value of the property of the companies engaged in the carrying business, deprives such companies of their property without due process of law, and is void, and the enforcement of such a tariff of rates will be enjoined in equity.¹⁵

§ 285. **Same—State law requiring transfer facilities at railroad intersections.**—Railway companies owning connecting, crossing or intersecting lines of railroads, are not deprived of their property without due process of law by a judgment rendered by a state court pursuant to and in conformity with a statute of the state, requiring them to provide at the place of connection, crossing, or intersection, ample facilities by track connections for transferring any and all cars used in the regular business of their respective lines of road from the line or tracks of one of the companies to those of the other, and to provide at such place equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering property and cars to and from their respective lines, when such judgment is, under the facts of the particular case, a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and does not unduly, unfairly, or improperly affect the pecuniary rights or interests of the companies; although to carry out the judgment, it may be necessary for the companies affected by it to acquire additional lands by the exercise of the power of eminent domain and will result in additional expense.¹⁶ In deciding the case cited, the supreme court, speaking through Mr. Justice Peckham, said: “Adher-

125 U. S. 181 (31:650); *Minneapolis & S. L. R. Co. v. Beckwith*, 129 U. S. 29 (32:586); *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386 (35:1051); *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 598 (41:560); *Gulf C. S. F. R. Co. v. Ellis*, 165 U. S. 150 (41:666); *Smyth v. Ames*, 169 U. S. 466 (42:819).

¹⁵ *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649 (39:567); *Railroad Commission Cases*, 116 U. S. 307 (29:636); *Dow v. Beldelman*,

125 U. S. 618 (31:841); *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418 (33:970); *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339 (36:176); *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362 (38:1014); *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 598 (41:560); *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1-27 (51:933).

¹⁶ *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 302 (45:194).

ing strictly to the question involved in this case, the validity or invalidity of the judgment actually rendered, we are met by the objection of the plaintiff in error that the judgment itself is necessarily and inherently illegal, because upon the conceded facts, if the judgment be enforced, it can only result in taking the property of the plaintiff in error without due process of law, and in refusing it the equal protection of the laws, and in depriving it of its liberty to contract with such persons or corporations as it may choose. We think not one of these objections tenable. At common law the courts would be without power to make such an order as was made in the case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind. If power were granted by the legislature, and it amounted in the particular case simply to a fair, reasonable, and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and the public, the legislation would be valid, and would furnish, therefore, ample authority for the court to enforce it. Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate, in a reasonable and proper manner, the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. It is because they are such highways that the land, upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right of the legislature to tax in furtherance of such use is founded upon the same consideration that the use is a public one, and therefore taxation in support of such use is valid. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience. While this power of regulation exists, it is

also to be remembered that the legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised.”¹⁷

§ 286. Same—Same—Limitations of the fourteenth amendment operate on all instrumentalities of the state government.—The limitations imposed by the fourteenth amendment upon the states refer to and operate upon all the instrumentalities of the state—its legislative, executive, and judicial authorities—and whoever, by virtue of public or official position under a state government, deprives another of his property without due process of law, violates the constitutional inhibition against the state; as he acts in the name of and for the state, and is clothed with the state’s power, his act is the act of the state.¹⁸ The state may not, by any of its agencies, disregard the inhibitions of the amendment. Its judicial authorities may keep strictly within the letter of the statutes prescribing the forms of procedure to be followed in the courts, and which may be ample for the protection of the rights of the citizen, and may give the parties interested the fullest opportunity to be heard, and yet they may, in their final judgments and decrees, deny the rights secured by the constitutional provision. Compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, and the final judgment of a state court, under authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of the amendment; and if, by such judgment, private property be taken by the state or under its direction, for public use, without compensation made or secured to the owner, the affirmance of that judgment by the highest court of the state is a denial by the state of the rights secured to the owner by the due process clause of the amendment.¹⁹

¹⁷ Wisconsin, M. & P. R. Co. v. Jacobson, *supra*.

¹⁸ Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 263 (41:979); *Ex parte Virginia*, 100 U. S. 339, 347 (25:676); *Neal v. Delaware*, 103 U. S. 370 (26:567); *Yeck Wo*

v. Hopkins, 118 U. S. 356 (30:220); *Gibson v. Mississippi*, 162 U. S. 579 (40:1078); *Scott v. McNeal*, 154 U. S. 34 (38:896); *Ry. v. Taylor*, 86 Fed. Rep. 184.

¹⁹ Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 263 (41:979).

§ 287. **Same—State statute denying non-resident corporation equality in distribution of insolvent's assets.**—A state statute which denies to corporations of other states equality with resident creditors in the distribution of the assets of an insolvent corporation doing business in the state, does not deprive such non-resident corporations of their property without due process of law;²⁰ nor is a non-resident mortgagee deprived of his property without due process of law by a state statute which subordinates his claim to the claims of resident creditors.²¹

§ 288. **Due process of law in state taxation—Strict judicial procedure not required.**—Neither in the states of the American union, nor in England prior to the revolution, have taxes, as a general rule, been collected by regular judicial proceedings in the regular and ordinary courts of justice; but the necessities of government, the usages of the people, and the nature of the governmental power exercised, and the duties to be performed by public officials, have established a mode of procedure in the levy, assessment, and collection of taxes, which is less formal and materially different from strict and formal judicial procedure, but which, however, is and always has been regarded and held as due process of law.²² Where life, or liberty, or the title, or possession of property, is involved, due process of law requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; but where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to the owner is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon regular proceedings in a court of justice, and they are not required for the enforcement of taxes and assessments. In determining what is due process of law, the courts will take into consideration the cause and object of the taking, whether under the power of eminent domain, or the taxing power, and, if under the latter, the nature of the tax, whether general, or a

²⁰ *Blake v. McClung*, 172 U. S. 239 (43:432).

²² *Kelly v. Pittsburg*, 104 U. S. 78, 83 (26:658).

²¹ *Sully v. American Nat. Bank*, 178 U. S. 289 (44:1072).

local assessment for local improvements; and if the procedure or process adopted be suitable to the special case and adapted to the end to be attained, it will be adjudged due process, but if found to be arbitrary, oppressive and unjust, it will be declared to be not due process of law.²³ There are some kinds or forms of taxation, in which the owners of the property upon which the tax or burden is to be imposed are entitled to notice and an opportunity to be heard at some stage of the proceeding; and in all such cases the due process clause of the fourteenth amendment to the federal constitution is an inhibition upon the states, imposing a limitation not upon the taxing power itself, but upon the mode and manner of its exercise; and this constitutional restraint upon state procedure in taxation will be enforced by the federal judiciary, and more especially by the supreme court upon writ of error to the highest court of the state, in all cases where the objection is duly made and the right under the constitutional provision is set up in the manner and at the time required by the laws and regulations controlling federal procedure.²⁴

²³ *Hagar v. Reclamation District*, 111 U. S. 701, 715 (28:569); *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 339 (29:414); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (33:892); *McMillen v. Davidson*, 95 U. S. 37, 42 (24:335); *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 539 (40:247); *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 241 (38:1031).

²⁴ *Davidson v. New Orleans*, 96 U. S. 97, 108 (24:616); *Hagar v. Reclamation District*, 111 U. S. 701, 715 (28:569); *Spencer v. Merchant*, 125 U. S. 356 (31:768); *Winona Land Co. v. Minnesota*, 159 U. S. 537 (40:251); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 155 (41:387); *Walston v. Nevin*, 128 U. S. 578, 582 (32:544); *Kentucky Railroad Tax Cases*, 115 U. S. 332 (29:417); *Lent v. Till-*

son, 140 U. S. 316, 334 (35:419); *Paulson v. City of Portland*, 149 U. S. 30, 44 (37:637); *Warts v. Hoagland*, 114 U. S. 615 (29:232); *Bellingham Bay & British Columbia Railroad Co. v. City of New Whatcom*, 172 U. S. 314, 320 (43:460); *Stanley v. Albany Co.*, 121 U. S. 550 (30:1003); *Mobile County v. Kimball*, 102 U. S. 691 (26:238); *United States v. Memphis*, 97 U. S. 284 (24:937); *Laramie County v. Albany Co.*, 92 U. S. 307 (23:552); *Palmer v. McMahon*, 133 U. S. 660 (33:772); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (33:892); *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421 (38:1031); *Kelly v. Pittsburg*, 104 U. S. 78 (26:658); *Webster v. Fargo*, 187 U. S. 394 (45:912); *Shumate v. Heman*, 181 U. S. 402 (45:922); *Farrell v. West Chicago Park Comm'rs*, 187

§ 289. **Same—When notice and an opportunity to be heard are requisite.**—Where an *ad valorem tax* is levied on property, and the value of the property is to be ascertained by assessors or by a special tribunal appointed for that purpose upon such evidence as they may obtain, the owner of the property is entitled to notice and an opportunity to be heard on the validity and amount of the tax imposed on his property, either before the amount is determined or in subsequent proceedings for its collection.²⁵ In distinguishing between the kinds of taxation in which notice and an opportunity to be heard are not required and those in which they are required, the supreme court of the United States, in one of the cases cited, speaking through Field, Justice, said:

“Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and, generally, specific taxes on things or persons or occupations. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. * * * But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by

U. S. 404 (45:924); *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421 (42:803).

²⁵ *Hagar v. Reclamation District*, 115 U. S. 701, 715 (28:569); *Bellingham Bay & British Columbia Railroad Co. v. New Whatcom*, 172 U. S. 314, 320 (43:460); *Davidson v. New Orleans*, 96 U. S. 97, 105 (24:616); *Kentucky Railroad Tax*

Cases, 115 U. S. 332 (29:417); *Lent v. Tillson*, 140 U. S. 316, 334 (35:419); *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 539 (40:247); *Paulsen v. Portland*, 149 U. S. 30, 42 (37:637); *Palmer v. McMahon*, 133 U. S. 660 (33:772); *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421 (38:1030)

law, to hear complaints respecting the justice of the assessment. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law. In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts, and be there corrected if erroneous, or set aside if invalid; or objections to the validity or the amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law."²⁶

§ 290. Same—Same—What is due process of law in taxation—General rule.—What is due process of law in the levy, assessment and collection of taxes, within the meaning of the fourteenth amendment to the federal constitution, in those forms of taxation which require notice and an opportunity to be heard? The general rule established by the decided cases seems to be that: Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state, or some more limited portion of the community, as a local assessment for local improvements, and those laws provide for a mode of confirming or contesting the charge thus imposed upon the property, either before the amount is determined or in subsequent proceedings for its collection, in special tribunals established for that purpose, or in the ordinary courts of justice, upon due notice to the owner, either actual or constructive, and in the latter case either by publication or by statute fixing the time and place of the hearing, and upon such hearing the owner is given an opportunity to question the validity and amount of the tax, the judgment in such proceedings meets the requirements of the fourteenth amendment as to due process of law, however obnoxious it may be to other objections.²⁷ In one of the cases cited, the court states the two

²⁶ Hagar v. Reclamation District, 115 U. S. 701, 715 (28:569). U. S. 97, 108 (24:616); Hagar v. Reclamation District, 111 U. S.

²⁷ Davidson v. New Orleans, 96 701 (28:569); Lent v. Tillson, 140

following propositions, and sustains them by a full citation of authorities namely:

(1) The rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before the amount is determined or in subsequent proceedings for its collection.²⁸

(2) That the notice is not personal but by publication, is not sufficient to vitiate it; and where the state statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested, to appear and defend, is suitable and one that sufficiently answers the demand of due process of law.²⁹

§ 291. Same—Same—Same—Notice.—When a state statute, providing for the assessment and valuation of property for purposes of taxation, names and fixes the time and place for the meeting of the assessment board, that is sufficient notice to the owners of the property to be assessed and valued; personal notice is unnecessary.³⁰ And a state statute which directs notice by publication that at a certain time the equalization board will hear and consider objections to the assessment rate by parties aggrieved by such assessment, is due process of

U. S. 316, 334 (35:419); *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 537 (40:251); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 155 (41:387); *Bellingham Bay & British Columbia Railroad Co. v. New Whatcom*, 172 U. S. 314, 320 (43:460); *Kentucky Railroad Tax Cases*, 115 U. S. 332 (29:417); *Spencer v. Merchant*, 125 U. S. 345 (31:763); *Palmer v. McMahon*, 133 U. S. 660 (33: 772); *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421 (38:103); *Taylor v. Seacor (State R. Tax Cases)*, 92 U. S. 575 (23:672); *Paulsen v. Portland*, 149 U. S. 30 (37:637); *King v.*

Portland, 184 U. S. 61 (46:43); *Bank v. Pennsylvania*, 167 U. S. 461 (42:236); *Goodrich v. Detroit*, 184 U. S. 432 (46:627).

²⁸ *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 539 (40:247), citing authorities.

²⁹ *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 539 (40:247), citing authorities.

³⁰ *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 438 (38:1031); *State R. Tax Cases*, 92 U. S. 610 (23:672); *Kentucky Railroad Tax Cases*, 115 U. S. 332 (29:417).

law, where the publication is made in a reasonable manner and for a reasonable length of time, and the time and place fixed in the notice are such that with reasonable effort the property owner will be able to attend and present his objections.³¹

§ 292. ~~Same—Same—~~Local assessments—Rules of apportionment.—The state legislature may, by statute, in the exercise of the taxing power, and without infringing the due process clause of the fourteenth amendment, create special local taxing districts, for the purpose of local improvements, and conclusively determine the question of benefits, and charge the cost of such improvement, in whole or in part, upon the property in the district, according either (1) to valuation, or (2) superficial area, or (3) frontage.³² In creating local taxing districts, the legislature may ascertain and determine for itself (1) the amount of tax to be raised, and (2) the benefited property which is to be embraced within the district, and upon which the tax is to be apportioned; or the legislature may commit the ascertainment and determination of both these matters to commissioners,³³ in which latter event the land owner has a right to be heard upon the question of benefits to his property before it is taken into the taxing district to be subjected to the assessment.³⁴ “In the absence of any more specific constitutional restriction than the general prohibition against taking private property without due process of law, the legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it

³¹ *Bellingham Bay & British Columbia Railroad Co. v. New Whatcom*, 172 U. S. 314, 320 (43:460); *Lent v. Tillson*, 140 U. S. 316, 328 (35:419); *Paulsen v. Portland*, 149 U. S. 30 (27:637).

³² *Webster v. Fargo*, 181 U. S. 394 (45:912); *Shumate v. Heman*, 181 U. S. 402 (45:922); *Farrell v. West Chicago Park Com'rs*, 181 U. S. 404 (45:924); *French v. Barber Asphalt Paving Co.*, 187 U. S. 324, 370 (45:879); *Davidson v. New Orleans*, 96 U. S. 97 (24:616); *Spencer v. Merchant*, 125 U. S. 345 (31:763); *Paulsen v. Port-*

land, 149 U. S. 30, 40 (37:637); *Hagar v. Reclamation District*, 111 U. S. 701 (28:569); *Fallbrook Irrigation Co. v. Bradley*, 164 U. S. 112 (41:369); *Detroit v. Parker*, 181 U. S. 399 (45:917); *Tonawanda v. Lyon*, 181 U. S. 389 (45:908); *Cass Farm Co. v. Detroit*, 181 U. S. 396 (45:914).

³³ *Spencer v. Merchant*, 125 U. S. 345, 361 (31:763).

³⁴ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (41:369); *Spencer v. Merchant*, 125 U. S. 356 (31:767); *Bauman v. Ross*, 167 U. S. 548 (42:270).

to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."³⁵ The legislature has the power to ascertain, determine and fix the territorial limits of a local taxing district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature, when it determines the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the land owners have no constitutional right to any other or further hearing upon that question.³⁶

§ 293. ~~Same—Same—Same—~~Frontage rule—Norwood v. Parker.—In *Norwood v. Parker*,³⁷ the supreme court of the United States held that the *frontage rule* established by the

³⁵ *Spencer v. Merchant*, 125 U. S. 345 (31:763).

³⁷ *Norwood v. Parker*, 172 U. S. 269, 303 (43:443).

³⁶ *Paulsen v. Portland*, 149 U. S. 30, 41 (37:637).

laws of the state of Ohio did not furnish due process of law, “upon the ground that the assessment against the plaintiff’s abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation;” the court, in other words, held in that case, in effect, that the determination by the legislature of the class of lands specially benefited by the improvement is not conclusive upon the courts nor upon the owner, and that such action of the legislature may be reviewed by the courts, upon the ground that it acted unjustly or without appropriate and adequate investigation and reason. That decision, it would seem, is not in harmony with other decisions of the court previously³⁸ and subsequently³⁹ rendered upon the question involved.

§ 294. Same—Same—Taxing non-resident mortgagee’s interest in the mortgaged land.—A state statute which authorizes the amount of a debt secured by a mortgage on land to be deducted from the mortgagor’s interest in the land in assessing it for taxes, and requires the mortgage and the debt to be taxed as real estate against the mortgagee to the extent of his interest in the land as represented by the mortgage, does not deprive a mortgagee, who resides in another state and has the mortgage in his possession there, of his property without due process of law.. The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And the state may, for the purposes of

³⁸ *Spencer v. Merchant*, 125 U. S. 345 (31:763); *Paulsen v. Portland*, 149 U. S. 30, 40 (37:637); *Bauman v. Ross*, 167 U. S. 548 (42:270); *Hagar v. Reclamation District*, 111 U. S. 701 (28:569); *Parsons v. District of Columbia*, 170 U. S. 45 (42:943).

³⁹ *Webster v. Fargo*, 181 U. S. 394 (45:912); *Shumate v. Heman*,

187 U. S. 402 (45:922); *Farrell v. West Chicago Park Com’rs*, 181 U. S. 404 (45:924); *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 370 (45:879); *Detroit v. Parker*, 181 U. S. 399 (45:917); *Tonawanda v. Lyon*, 181 U. S. 389 (45:908); *Cass Farm Co. v. Detroit*, 181 U. S. 396 (45:914).

taxation, either treat the mortgage debt as personal property to be taxed like other choses in action, to the creditor at his domicile; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs.⁴⁰

§ 295. Same—Same—Classification for taxation.—It is not the purpose of the fourteenth amendment to prevent the states from classifying the subjects of legislation, and making different regulations as to the property of different individuals or different classes of individuals differently situated; nor to compel the states to adopt any iron rule in regard to taxation; nor to prevent the states from classifying property for taxation at different rates and by different modes of assessment. The provisions of the federal constitution are satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed; it is enough that there is no discrimination in favor of one as against another of the same class.⁴¹

§ 296. Same—Same—Corporations—Corporations are persons within the meaning of the due process clause of the fourteenth amendment to the federal constitution.⁴²

§ 297. Same—Same—State constitution and laws on taxation must be considered together.—In ascertaining and determining the constitutional validity of state tax laws under the due process clause of the fourteenth amendment, the supreme court of the United States will look to and consider and construe together all the state constitutional and statutory provisions on

⁴⁰ *Savings & Loan Society v. Multnomah County*, 169 U. S. 421, 432 (42:803).

⁴¹ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618 (48:1142); *Groza v. Tiernan*, 148 U. S. 657, 662 (37:599); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (33:892); *Home Ins. Co. v. New York*, 134 U. S. 594 (33:1025); *Pacific Exp. Co. v. Selbert*, 142 U. S. 339 (35:1035); *Kentucky Railroad Tax Cases*, 115 U. S. 321 (29:414); *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 (42:1037); *State Railroad Tax Cases*, 92 U. S. 575, 618 (23:663).

⁴² *Smyth v. Ames*, 169 U. S. 466, 550 (42:879); *Santa Clara County v. So. Pac. R. Co.*, 118 U. S. 394, 396 (30:118); *Charlotte, C. & A. Railroad v. Gibbes*, 142 U. S. 386, 391 (35:1051); *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 154 (41:666); *Pembina Consol. Silver Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 189 (31:650); *Missouri P. R. Co. v. Mackey*, 127 U. S. 205 (32:107); *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32:588); *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578 (41:560).

the subject of taxation, and if, when so considered and construed, they establish a state system of taxation which is, in its essential features, consistent with due process of law, they will be upheld; and it has accordingly been held that the system of taxation established by the constitution and laws of West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed, or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representatives of the state in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his land from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the constitution of the United States or the state.⁴³

§ 298. Same—Taxing power vested in the legislature.—The power of taxation is an attribute of sovereignty; it is a sovereign power, inherent in all governments.⁴⁴ In the American system of government, the taxing power is vested exclusively in the legislative department,⁴⁵ and the judicial department cannot prescribe to the legislature limitations upon its exercise of the power of taxation.⁴⁶ The several states, each, in the exercise of its reserved powers of municipal sovereignty, acting through its legislature, when not restrained by its own or the federal constitution, may, for public purposes, tax all the property within its jurisdiction,⁴⁷ except the property,⁴⁸

⁴³ *King v. Mullins*, 171 U. S. 404, 437 (43:214).

⁴⁴ *McCulloch v. Maryland*, 4 Wheat. 316, 428 (4:579).

⁴⁵ *Spencer v. Merchant*, 125 U. S. 345, 361 (31:763); *United States v. New Orleans*, 98 U. S. 381, 392 (25:225); *Merewether v. Garrett*, 102 U. S. 472 (26:197).

⁴⁶ *Spencer v. Merchant*, 125 U. S. 345, 361 (31:763); *Veazie Bank v. Fenno*, 8 Wall. 533, 548 (19:482); *Providence Banks v. Bill-*

ings, 4 Pet. 514, 563 (7:939); *McCulloch v. Maryland*, 4 Wheat. 316, 428 (4:579).

⁴⁷ *Railroad Co. v. Pennsylvania*, 153 U. S. 628, 649 (38:846); *Cleveland, P. & N. R. Co. v. Pennsylvania*, 15 Wall. 300, 319 (21:179); *North Cent. R. Co. v. Jackson*, 7 Wall. 262 (19:88); *St. Louis v. Wiggins' Ferry Co.*, 11 Wall. 423 (20:192); *Minot v. Philadelphia, W. & B. R. Co.*, 18 Wall. 206 (21:888); *McCulloch v. Maryland*, 4

securities,⁴⁹ and instrumentalities⁵⁰ of the federal government. Usually the possession of the legal title to land by the government determines both the fact and the right of ownership; but where congress has prescribed the conditions upon which portions of the public domain may be alienated, and provided that upon the performance of the conditions a patent from the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such patent issues holding the legal title in trust for him, who in the meantime is not excluded from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land, and the same will be held subject to taxation by the state as his property. This exception to the general doctrine is founded upon the principle that he who has the right to the property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxation.⁵¹ A tax upon the property of federal agencies does not deprive them of the power to serve the government as they were intended to serve it, nor hinder the efficient exercise of their power, but leaves them free to discharge the duties they have undertaken to perform, and is, therefore, not forbidden by the federal constitution.⁵²

Wheat. 316, 428 (4:579); *Union Pacific R. Co. v. Peniston*, 18 Wall. 5 (21:787).

⁴⁸ *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, 514 (33:687); *Van Brocklin v. Tennessee*, 117 U. S. 151, 168 (29:845); *McGoon v. Scales*, 9 Wall. 23 (19:545); *Tucker v. Ferguson*, 22 Wall. 527 (22:805); *Kansas City R. Co. v. Prescott*, 16 Wall. 603 (21:373); *Union Pacific R. Co. v. McShane*, 22 Wall. 444 (22:747); *Northern Pac. R. Co. v. Rockue*, 115 U. S. 600 (29:477).

⁴⁹ *Society for Savings v. Colt*, 6 Wall. 594 (18:897); *New York v. Com'rs of Taxes*, 2 Black, 620 (17:451); *Provident Inst. for Saving v.*

Massachusetts, 6 Wall. 611 (18:907); *Weston v. Charleston*, 2 Pet. 449 (7:481); *Mitchell v. Leavenworth County*, 91 U. S. 206 (23:302); *New York v. Hoffman*, 7 Wall. 16 (19:57).

⁵⁰ *McCulloch v. Maryland*, 4 Wheat. 316 (4:579); *Osborn v. Bank of United States*, 9 Wheat. 738 (6:204); *Dobbins v. Erie County*, 16 Pet. 435 (10:1022).

⁵¹ *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, 514 (33:687); *Carroll v. Safford*, 3 How. 441, 460 (11:671); *Witherspoon v. Duncan*, 4 Wall. 210, 218 (18:339).

⁵² *Union Pacific R. R. Co. v. Peniston*, 18 Wall. 5, 50 (21:787);

(g) EQUAL PROTECTION OF THE LAWS.

§ 299. **The states prohibited from denying equal protection of the laws.**—It is declared in the fourteenth amendment that “no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.” This is a limitation upon the states; it is an inhibition upon the states; it applies to, and restrains all the instrumentalities of the state, legislative, executive and judicial, and whoever by virtue of public position under a state government deprives another of the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name of and for the state, and is clothed with its power, his act is that of the state.⁵³ The inhibition does not apply to the acts of private individuals.⁵⁴

§ 300. **Corporations are persons within the prohibition.**—It is well settled that corporations are persons within the meaning of the constitutional prohibition against the denial of the equal protection of the laws;⁵⁵ but a corporation not created by the laws of a state, and not doing business in that state under such conditions as subject it to the process of the state, and not having complied with the laws of the state which are made a condition of its doing business therein, is not, within the meaning of the inhibition, “within its jurisdiction.”⁵⁶

§ 301. **Classification for purposes of legislation.**—The several states, each, respectively, may, in the exercise of its police powers, classify persons, corporations, businesses, occupations, employments, rights and liabilities, for the purpose of adapting legislation to the special requirements and necessities of the members of the several classes. But the classification must not be arbitrary; it must be reasonable and germane to the proposed legislation, and must rest upon some substantial differ-

Thompson v. Union Pac. R. Co., 9 Wall. 579 (19:792); Western Union Telegraph Co. v. Massachusetts, 125 U. S. 549 (31:793).

⁵³ Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 263 (41:979); Civil Rights Cases, 109 U. S. 3, 62 (27:836); Slaughter-House Cases, 16 Wall. 36 (21:394); Ex parte Virginia, 100 U. S. 339, 346 (25:676); Neal v. Delaware, 103 U. S. 370 (26:567); Yick Wo. v. Hop-

kins, 118 U. S. 356 (30:220); Gibson v. Mississippi, 162 U. S. 579 (40:1078); Scott v. Neal, 154 U. S. 34 (38:896).

⁵⁴ Civil Rights Cases, *supra*.

⁵⁵ Ry. Co. v. Ellis, 165 U. S. 150, 168 (41:666) and authorities there cited.

⁵⁶ Blake v. McClung, 172 U. S. 658 (43:432); Fire Association of Philadelphia v. New York, 119 U. S. 110-129 (30:342).

ence or distinction which has a just and reasonable relation to the object sought to be accomplished by the legislatures.⁵⁷

§ 302. **Same—Rules stated by supreme court of Wisconsin.**—The rules upon this subject of classification have been stated by the supreme court of Wisconsin as follows:

“Legislative discretion to classify persons for the purposes of legislation is substantially the same under the fourteenth amendment of the federal constitution as under the state constitutional provision prohibiting special legislation. The rules on the subject which generally prevail, and which have received the sanction of this court, are as follows: (1) All classification must be based upon substantial distinctions which make one class really different from another. (2) The classification adopted must be germane to the purposes of the law. (3) The classification must not be based upon existing conditions only; it must not be so constituted as to prevent additions to the number included within the class. (4) To whatever class a law may apply, it must apply equally to each member thereof. Whether any particular classification made by the legislature satisfies those requisites is primarily a legislative question. The field covered by its discretionary power in the matter is very broad. It is, of course, not above judicial control, but it is safe from restraint so long as any reasonable ground can be discovered to support it. The courts can apply no test to the matter except the constitutional test. That of the mere wisdom of the measure is exclusively for legislative consideration.”⁵⁸

§ 303. **Same—State statute abolishing common law fellow-servant rule in personal injury cases.**—A state statute which provides that every railroad company organized or doing business in the state shall be liable for all damages done to any em-

⁵⁷ *Missouri Pac R. Co. v. Mackey*, 127 U. S. 205 (32:107); *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210 (32:109); *Chicago K. & W. R. Co. v. Pontius*, 157 U. S. 209 (39:675); *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348 (44:192); *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1 (41:611); *Atchison, Topeka & S. F. R. Co. v. Mathews*, 174 U. S. 69 (43:909); *Ry.*

Co. v. Ellis, 165 U. S. 150 (41:666); *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 524 (29:463); *Cargill Co. v. Minnesota Railroad & Warehouse Comm.*, 180 U. S. 452 (45:619).

⁵⁸ *Julien v. Model Building, L. & I. Ass'n*, (Wis.) 61 L. R. A. 668; *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270.

ploye of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage, does not deprive such companies of the equal protection of the laws within the meaning of the fourteenth amendment to the federal constitution. The hazardous character of the business of operating a railway calls for special legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and, therefore, no objections can be made to such legislation on the ground of its making an unjust discrimination.⁵⁹ And the mere fact that the regular employment of the person injured was that of a bridge builder does not take him out of the operation of the statute, if the injury happened to him while he was engaged in labor directly connected with the operation of the railroad.⁶⁰

§ 304. **Same—State statute making railroad companies absolutely responsible for damages by fire from their engines.**—Railroad companies are not deprived of the equal protection of the laws, within the meaning of the fourteenth amendment, by a state statute, applicable alike to those organized both before and after its enactment, providing that every railroad corporation owning or operating a railroad in the state shall be responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines, and giving such company an insurable interest in all the property along its route, and authorizing it to insure such property for its protection against such damage.⁶¹ The *ratio decidendi* of the cases upholding such legislation is that: The motives which have induced, and the reasons which justify such legislation may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and de-

⁵⁹ *Missouri Pacific R. Co. v. Mackey*, 127 U. S. 205 (32:107); *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 212 (39:675); *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 212 (32:109); *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348 (44:192).

⁶⁰ *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 212 (39:675).

⁶¹ *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1, 27 (41:611); *Atchison, Topeka & S. F. R. Co. v. Matthews*, 174 U. S. 96 (43:909).

structive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which it may fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry on the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon their engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. Such a statute is not a penal one, imposing a punishment for a violation of law; but it is purely remedial, making the party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages measured by the injury suffered.⁶²

§ 305. Same—State statute making proof of fire by railroad engine prima facie evidence of negligence—Attorney's fees.—Railroad companies are not deprived of the equal protection of the laws by a state statute which provides that, in all actions against any railway company organized or doing business in the state, for damages by fire caused by the operating of the railroad, proof by the plaintiff of the fact that the fire com-

⁶² St. Louis & S. F. R. Co. v. Matthews, 165 U. S. 1, 27 (41:611). "At common law, every man appears to have been obliged, by the

custom of the realm, to keep his fire safe so that it should not injure his neighbors; and to have been liable to an action, if a fire

plained of was caused by operating the railroad and the amount of damages sustained by it shall be *prima facie* evidence of negligence on the part of the railroad company, and allowing the plaintiff a reasonable attorney's fee, in case of recovery, to become a part of the judgment.⁶³

§ 306. Same—When statute allowing attorney's fee is penalty for failure to pay debt.—A state statute, enacted not in the exercise of the police power, allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims not exceeding in amount fifty dollars, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, is simply a statute imposing a penalty on railroad corporations for a failure to pay the class of debts named, and is not one to enforce compliance with any police regulation, and is violative of the fourteenth amendment.⁶⁴

§ 307. Same—State statute requiring railroad companies to fence track—Double damages for killing stock.—A state statute which requires all railroad corporations formed or operating a railroad in the state to fence their railroads where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands with gates, and to construct and maintain cattle guards, and in case of failure to do so making such corporations liable in double the amount of all damages done by their agents, engines, or cars, to live stock, or damage done by live stock escaping from or coming upon such lands, fields or inclosures, does not deny such railroad corporations the equal protection of the laws.⁶⁵

§ 308. Same—Regulation of warehouses and elevators.—A state statute which declares that, all elevators and warehouses in which grain is received, stored, shipped or handled, and which are situated on the right of way of any railroad, depot

lighted in his own house, or upon his land, by the act of himself or his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other unavoidable accident which he could not have foreseen." *St. Louis & S. F. R. Co. v. Matthews, supra.*

⁶³ *Atchison, Topeka & S. F. R. Co. v. Matthews*, 174 U. S. 96, 125 (43:909).

⁶⁴ *Ry. Co. v. Ellis*, 174 U. S. 96, 125 (43:909).

⁶⁵ *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512 (29:463); *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U. S. 26 (32:585).

grounds, or any lands acquired or reserved by any railroad company in the state, to be used in connection with its line of railway at any station or siding in the state, other than at terminal points, shall be public elevators, and shall be under the supervision and subject to the inspection of the railroad and warehouse commission of the state, and known and designated as public country elevators or as country ware houses, and requiring the owners thereof to obtain a license from the state before receiving, shipping, storing or handling any grain in such elevators or warehouses, but not requiring a license of the owners of elevators and warehouses differently situated, does not deprive the owners so required to procure a license of any rights secured to them by the fourteenth amendment. Such a statute is not invalid by reason of its not applying to persons or corporations who own or operate elevators not situated on the right of way of the railroad company.⁶⁶

§ 309. Same—Life and health insurance companies—State statute imposing damages and attorney's fees for failure to pay policy when due.—The placing of life and health insurance companies in a different class from fire, marine and inland insurance companies, and in a different class from mutual benefit and relief associations doing business through lodges and benevolent associations, is not an arbitrary classification, but rests on sufficient reason; and the Texas statute, authorizing the recovery from life and health insurance companies, in addition to the amount of the loss or policy, twelve per cent damages on the amount of such loss, together with reasonable attorney's fees for the prosecution and collection of the loss, in all cases where the company liable therefor shall fail to pay the loss within the time specified in the policy, does not violate the fourteenth amendment.⁶⁷

§ 310. Same—Limiting hours of labor in mines.—The police power extends to the protection and preservation of the health of persons engaged in noxious employments, and a state statute limiting the employment of working men in all underground mines, and smelters and all other institutions for the

⁶⁶ *W. W. Cargill Co. v. Minnesota ex rel. Railroad & Warehouse Com.*, 180 U. S. 452, 470 (45:619).

⁶⁷ *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 336 (46:922); *Iowa Life Insurance Co. v. Lewis*, — U. S. — (48:—).

reduction or refining of ores or metals, to eight hours per day, except in cases of emergency where life or property is in imminent danger, does not deny to such laborers or their employers the equal protection of the laws, nor is such a statute an unjust or oppressive interference with the right of contract.⁶⁸

§ 311. **Same—Illinois trust act.**—The ninth section of the Illinois Trust Act of June 20, 1903, which exempts from the provisions and operations of the act “agricultural products and live stock while in the hands of the producer or raiser,” denies the equal protection of the laws to all persons not embraced in the exemption, and renders the entire act unconstitutional, null and void. The decision holding the statute void was placed upon the ground that, under its operation, all persons except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, whilst agriculturalists, and live stock raisers, in respect of their products or live stock on hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state, and the ninth section of the act could not be disregarded and the remainder upheld without producing results not contemplated or desired by the legislature; and, therefore, the statute was, by the supreme court, regarded as an entirety, and in that view adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who were not embraced within exceptions contained in the ninth section.⁶⁹

§ 312. **Taxation and the equal protection of the laws.**—Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, are not attainable. It may be admitted that the system which most nearly attains perfect equality and uniformity is the best; but the most complete system which can be devised, when it comes to be applied to the immense variety of subjects which it necessarily embraces, must be imperfect, and necessarily produces inequalities in its operation.⁷⁰

The supreme court of the United States, while not attempt-

⁶⁸ Holden v. Hardy, 169 U. S. 366, 398 (42:780).

⁶⁹ Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 571 (46:679).

⁷⁰ State Railroad Tax Cases, 92 U. S. 575, 618 (23:663); German Nat. Bank v. Kimball, 103 U. S. 732, 735 (26:469).

ing to prescribe any specific rule as to the reach of the "equal protection" clause of the fourteenth amendment, in regard to the state's power of taxation, has formulated a general doctrine, expressed by the court as follows:

"The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt."⁷¹

⁷¹ Bell's Gap Railroad Co. v. American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95 (45:102).
134 U. S. 232, 240 (33:893); Am-

The constitution of the state of Louisiana which classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands for that purpose, and imposes a tax on the latter only, does not deprive the refiners so taxed of the equal protection of the laws within the meaning of the fourteenth amendment.⁷²

§ 313. **Same—The unit rule in the taxation of interstate commerce lines.**—Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be taxed by the state; and whatever the particular form of the exaction, if it is essentially only a property tax, it will not be considered as falling within the implied constitutional inhibition against state taxation of interstate commerce. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collected by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government.

In the taxation, by the state, of the property of railroad, telegraph and sleeping-car companies, engaged in interstate commerce, the property of such companies in the several states through which their lines or business extend may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is devoted and all the elements making up aggregate value, and a proportion of the whole fairly and properly ascertained may be taxed by the particular state, without violating any federal restrictions.⁷³

⁷² American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95 (45:102).

⁷³ Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 255 (41:683); Western Union Tel. Co. v. Massachusetts, 125 U. S. 530

(31:790); Massachusetts v. Western Union Tel. Co., 141 U. S. 40 (35:628); Maine v. Grand Trunk R. Co., 142 U. S. 217 (35:994); Pittsburg C. C. & St. L. R. Co. v. Backus, 154 U. S. 421 (38:1031); Cleveland, C. C. and St. L. R. Co.

§ 314. **Same—Same—Method of assessment.**—A state *ad valorem* tax, assessed and levied upon the property within its limits, of a foreign telegraph corporation, owning and operating an interstate telegraph line, the value of which was ascertained and determined by the state board of equalization, upon due notice and a regular hearing, and upon which the board took into consideration the value and cost of the construction and equipment of the entire telegraph line, and its location, and its traffic and business, and the market and par value of its stock and bonds, and its gross receipts and net earnings, and its franchise and the value thereof, and a consideration of the line as an entirety and a system, located partly in that state and partly in other states, and then estimating the value of that part of the line located in the state in the ratio or proportion which it bears to the length of the entire line or system, is a valid and constitutional exercise of the taxing power, although the telegraph company was engaged in interstate commerce, and had accepted the permissive privilege granted by the act of congress to such companies to run the lines of their wires over and along the military and post roads of the United States.⁷⁴

§ 315. **Same—Power of the state to fix the situs of the transitory property of railroads for purposes of taxation.**—The property of a railroad company for purposes of taxation consists of its realty, its local personalty, its rolling stock, its choses in action, and its franchise. The franchise is the privilege conferred by the charter of incorporation, namely, the right to exercise all the powers granted in the mode prescribed for the purpose of profit. The franchise is a unit, its exercise

v. Backus, 154 U. S. 439 (38:1041); Western Union Teleg. Co. v. Taggart, 163 U. S. 1 (41:49); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (35:613); R. R. Tax cases, 18 Wall. 208 (21:888); Erle R. R. Co. v. Pennsylvania, 21 Wall. 492 (22:595); State Railroad Tax cases, 92 U. S. 275, 618 (23:633); Western Union Teleg. Co. v. Missouri, 190 U. S. 412, 427 (47:1116). Where the road of a corporation runs through different

states, a tax upon the income or franchise of the road is properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. State Railroad Tax Cases, 92 U. S. 275, 618 (23:663), and authorities there cited.

⁷⁴ Western Union Telegraph Co. v. Missouri, 190 U. S. 412, 427 (47:1116).

not being confined to any one county, but extending to all counties traversed by the railroad; and the principal value of the franchise is the right to charge and take tolls and compensation for the carriage and transportation of freight and passengers. According to the rules and principles of the common law, the transient and unlocated property of a railroad company, its rolling stock, choses in action, and personal property have their situs at the domicile or place of business of the company; but the legislature of the state may, by law, change the situs of such property for the purposes of taxation and other purposes. And a railroad company, whose line of road is wholly within one state, is not deprived of the equal protection of the laws by a statute of that state which apportions the rolling stock and other unlocated personal property of the company for purposes of taxation among the several counties traversed by the railroad, while, under the general laws of the state, the personal property, whether tangible or intangible, of all other persons and companies is taxable in the counties in which they reside or are domiciliated.⁷⁵

⁷⁵ *Columbus Southern Railway Co. v. Wright*, 151 U. S. 470, 483 (38:238). The case cited involved the constitutional validity of a statute of the state of Georgia, apportioning the transitory and unlocated property of the railroad company among the counties traversed by the road, for the purposes of taxation; and in deciding the case, the court, speaking by Mr. Justice Jackson, said:

"The whole complaint made by the plaintiff in error is that it had a constitutional right to have its rolling stock, and other unlocated personal property, taxed in the county of Muscogee where it had its principal office, and to give such property a different situs, under the act complained of, was an unjust discrimination, and violated its constitutional rights. This proposition cannot be entertained for a moment, for the reason al-

ready stated, that it is clearly within the province of the legislature of Georgia to give such personal property a different situs, for purposes of taxation, from that of the company's principal office. The act in question having apportioned the transitory and unlocated property of the railroad company among the several counties through which the road extends for the purpose of taxation, and having subjected such property to the same rate of taxation imposed upon all other property in the respective counties, the fact that the rate of taxation varied in the different counties, according to their respective wants and necessities, involved no discrimination against the railroad company. The state having the undoubted authority to fix the situs of such property, and having lawfully distributed it proportionately between the sev-

§ 316. Same—Power of the state to tax railroad companies to pay salaries and expense of railroad commission.—Railroad companies are not denied the equal protection of the laws by a state statute which prescribes numerous provisions for the regulation and government of railroads in the state, authorizes the governor to appoint three railroad commissioners charged with the duty of enforcing its provisions, and directs that the entire expenses of the railroad commission, including all salaries and expenses of every kind, shall be borne by the several corporations owning or operating railroads within the state according to their gross income proportioned to the number of miles of railroad in the state, to be apportioned by the comptroller general of the state, who on or before the first day of October in each and every year shall assess upon each and every such corporation its just proportion of such expenses in proportion to its gross income for the current year ending on the thirtieth day of June next preceding that on which the assessment is made, and that the assessment shall be charged up against such corporations, respectively, and shall be collected by the several county treasurers in the state in the manner provided by law for the collection of taxes from such corporations, and paid by the county treasurers, as collected, into the treasury of the state in like manner as other taxes collected by them for

eral counties traversed by the road, it thereby became subject to the same rate of taxation as other property in the respective counties. This involved no inequality, and violated no provision of either the state or federal constitution. It certainly did not involve a failure to extend to the plaintiff in error the equal protection of the laws." *Columbus Southern R. Co. v. Wright*, *supra*.

On this general subject, see the following cases: *State Railroad Tax Cases*, 92 U. S. 575 (23:663); *Kentucky Railroad Tax Cases*, 115 U. S. 321, 339 (29:414); *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32:588); *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S.

386 (35:1051); *Nashville C. & St. L. R. Co. v. Franklin County*, 12 Lea, 522, 539; *Gallatin v. Alexander*, 10 Lea, 475; *Nashville v. Thomas*, 5 Coldw. 607; *McLaughlin v. Chadwell*, 7 Heisk. 389; *Bedford v. Nashville*, 7 Heisk. 409; *State v. Severance*, 55 Mo. 379, 388; *Pittsburg C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421 (38:1031); *Minot v. Philadelphia W. & B. R. Co.*, 18 Wall. 206 (21:888); *Erie R. Co. v. Pennsylvania*, 21 Wall. 492 (22:595); *Western Union Tel. Co. v. Atty. Genl.* 125 U. S. 530 (31:790); *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35:613); *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 (35:994).

the state; although the property of railroad companies in the state is subjected by general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality, in its assessment are imposed, and no tax is levied upon corporations other than railroad corporations, to specifically meet an expenditure for the salaries of state officers,⁷⁶

The case cited arose under the railroad commission law of South Carolina, and the court, in upholding the tax imposed on the railroad companies for the payment of the expenses of the commission, after reciting the provisions of the statute as to the duties of the commission, stated the *ratio decidendi* of the case as follows:

“It is evident, from these and many other provisions that might be stated, that the duties of the railroad commissioners, when properly discharged, must be in the highest degree beneficial to the public, securing faithful service on the part of the railroad companies, and safety, convenience, and comfort in the operation of their roads. That the state has the power to prescribe the regulations mentioned there can be no question. Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the states’ right of eminent domain, that they may appropriate for their uses the necessary property of others, upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the state, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. That regulation may extend to all measures deemed essential not merely to secure the safety

⁷⁶ *Charlotte C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 395 (35:1051).

of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such cases should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this, there is no encroachment upon the fourteenth amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is required, and to whom it is useful, is neither denying to the corporations the equal protection of the laws, nor making any unjust discrimination against them. All railroad corporations in the state are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge is made at all against other corporations. There is no charge when there is no service rendered. The legislative and constitutional provision of the state, that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the state to meet the special service required.”⁷⁷

⁷⁷ *Charlotte C. & A. R. Co. v. Gibbes, supra.*

§ 317. **Same—Classification.**—The fourteenth amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind of property to a different rate, and distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. The greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected.⁷⁸ Diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality and of a just adaptation of property to its burdens.⁷⁹

§ 318. **Power of the state to impose conditions of admission upon foreign corporations.**—Corporations are not citizens within the meaning of the constitutional provision, declaring that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;” and the provision of the fourteenth amendment, declaring that no state shall “deny to any person within its jurisdiction the equal protection of the laws,” does not prohibit a state from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits.⁸⁰ The only limi-

⁷⁸ *Home Ins. Co. v. People of the State of New York*, 134 U. S. 594, 607 (33:1025).

⁷⁹ *Pacific Express Co. v. Seibert*, 142 U. S. 339, 365 (35:1035).

⁸⁰ *Norfolk & Western R. Co. v. Commonwealth of Pennsylvania*, 136 U. S. 114, 121 (34:394); *Pembina Con. Silver Mining, etc. Co. v.*

Pennsylvania, 125 U. S. 81 (31:650); *Fire Association of Philadelphia v. New York*, 119 U. S. 110, 129 (30:342); *Paul v. Virginia*, 8 Wall. 168 (19:357); *Ducat v. Chicago*, 10 Wall. 410 (19:972); *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566 (19:1029); *Doyle v. Continental Ins. Co.*, 94

tation upon the power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing such corporation to do business or hire offices within its limits, arise where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. It is well settled that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate or foreign commerce, or impose any burdens upon such commerce within its limits.⁸¹

§ 319. Civil rights—Exclusion of negroes from grand and petit juries.—Whenever by any action of the state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand or petit jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the fourteenth amendment of the constitution of the United States.⁸² But no person charged with a crime involving life or liberty is entitled, by virtue of the constitution of the United States, to have his race represented upon the grand jury that may indict him, or upon the petit jury that may try him.⁸³ A person of the African race charged with a crime involving his life or liberty is not denied the equal protection of the laws by a state constitution and laws which do not in terms discriminate against the colored race, but do grant a discretionary power to administrative officers which may be used by them to abridge the right of colored persons to serve

U. S. 535 (24:148); *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 (28:1137).

⁸¹ *Pembina Con. Silver Mining, etc. Co. v. Pennsylvania*, 125 U. S. 181, 190 (31:650); *McCall v. People of The State of California*, 136 U. S. 104, 114 (34:391); *Norfolk & Western R. Co. v. Commonwealth of Pennsylvania*, 136 U. S. 114, 121 (34:394); *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 12 (24:711).

⁸² *Carter v. Texas*, 177 U. S. 442, 449 (44:839); *Strauder v. West Virginia*, 100 U. S. 303 (25:664); *Neal v. Delaware*, 103 U. S. 730, 739 (26:576); *Gibson v. Mississippi*, 162 U. S. 565 (40:1075); *Rogers v. Alabama*, 192 U. S. 226, 231 (48:417).

⁸³ *Wood v. Brush*, 140 U. S. 278 (35:515); *Jigiro v. Brush*, 140 U. S. 291 (35:110); *Ex Parte Commonwealth of Virginia*, 100 U. S. 313, 338 (25:667).

on juries, when it is not shown that the actual administration of such constitution and laws was evil, but only that evil was possible under them.⁸⁴

§ 320. **The fourteenth amendment does not require state judicial procedure to be uniform.**—The provision of the fourteenth amendment, declaring that no state shall “deny to any person within its jurisdiction the equal protection of the laws,” does not require that state judicial procedure shall be uniform throughout the territorial limits of the state, but allows diversity in the organization, jurisdiction and procedure of the courts in the different political divisions of the state, as its legislature may determine. The amendment does not prohibit state legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. The state has the right to make political subdivisions of its territory for governmental purposes, and establish for them different systems for the administration of justice.⁸⁵ A state statute may allow the state a larger number of peremptory challenges in capital cases in populous cities and a smaller number in rural districts;⁸⁶ or it may abridge the right of trial by jury in large cities without making a similar abridgement in the counties of the state;⁸⁷ or it may establish different appellate tribunals for the large cities and for the counties of the state.⁸⁸ It is fundamental rights which the fourteenth amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that rights which are thus protected

⁸⁴ *Williams v. State of Mississippi*, 179 U. S. 213, 225 (42:1012).

⁸⁵ *Bowman v. Lewis*, 101 U. S. 22 (25:989); *Hayes v. Missouri*, 120 U. S. 68, 72 (30:578); *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474, 475 (43:520); *Cincinnati Street*

Railway Company v. Snell, 193 U. S. 30, 38 (48:604).

⁸⁶ *Hayes v. Missouri*, 120 U. S. 68, 72 (30:578).

⁸⁷ *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474, 475 (43:520).

⁸⁸ *Bowman v. Lewis*, 101 U. S. 22 (25:989).

and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail. The mere direction of the state law that a cause, under given circumstances, shall be tried in one forum instead of another, or may be transferred, when brought, from one forum to another, can have no tendency to violate the guaranty of the equal protection of the laws, where in both forums equality of law governs and equality of administration prevails.⁸⁹

§ 321. Power of the state to classify cities for the registration of voters.—The state has the power to classify according to population the cities within its limits for the purpose of the registration of voters, and to apply to one city a registration law different in essential particulars from that which regulates the conduct of registration and elections in other cities in the state; and such diversity of legislation does not deny the equal protection of the laws to the citizens of the one city which is withdrawn from the operation of the law controlling the other cities in the state, although the law applicable to that one city may not as effectually safeguard the right and privileges of voting as the laws applicable to other cities.⁹⁰

§ 322. State law imposing penalty on railroad companies for disseminating Johnson grass seed.—The Texas statute which imposes upon railway companies alone a penalty of twenty-five dollars for permitting Johnson grass or Russian thistle to mature and go to seed upon their right of way, such penalty to be recovered in an action brought by the owners of contiguous farms, who are themselves innocent of doing the same thing, does not deny such companies the equal protection of the laws.⁹¹ In deciding the case cited, the supreme court, speaking by Mr. Justice Holmes, said:

“It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admit-

⁸⁹ Cincinnati Street Car Co. v. Snell, 193 U. S. 30, 38 (48:604).

⁹¹ Missouri, Kansas & Texas Railway Company v. May, 194 U. S. 267, 271 (48:971).

⁹⁰ Mason v. Missouri, 179 U. S. 328, 335 (45:214).

ted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of lands on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of the line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of congress that certain means are necessary and proper to carry out one of its express powers. When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

“Approaching the question in this way, we feel unable to say that the law before us may not have been justified by the local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”

§ 323. The design of the “equal protection” clause of the fourteenth amendment.—The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of

persons from being singled out as a special subject for discriminating and hostile legislation;⁹² it was not designed to prohibit legislation which, in carrying out a public purpose, is limited in its application, either in the objects to which it is directed, or by the territory within which it is to operate, if within the sphere of its operation it affects alike all persons and property similarly situated.⁹³

§ 324. Conspiracy to deprive persons of the equal protection of the laws—Section 5519, U. S. Revised Statutes, void.—The provisions of the first section of the fourteenth amendment to the federal constitution have reference to state action exclusively and not to any action of private individuals; and, therefore, section 5519 of the Revised Statutes of the United States, making it a criminal offense for two or more persons in any state or territory to conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, is, as to its operation within a state, unauthorized by the federal constitution or any amendment thereto, and is void.⁹⁴

(h) **THE RIGHT OF CITIZENS OF THE UNITED STATES TO VOTE NOT TO BE ABRIDGED ON ACCOUNT OF RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE.**

§ 325. The fifteenth amendment does not confer the right to vote.—The fifteenth amendment to the federal constitution declares that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition

⁹² *Pembina Con. Silver Mining, etc. Co. v. Pennsylvania*, 125 U. S. 181, 190 (31:650).

⁹³ *Hayes v. Missouri*, 120 U. S. 68, 71 (30:578); *Barbier v. Connolly*, 113 U. S. 27 (28:923); *Bowman v. Lewis*, 101 U. S. 22 (25:989); *Walston v. Nevin*, 128 U. S. 578, 582 (32:544); *Wurts v. Hoog-*

land, 114 U. S. 606 (29:229); *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 529 (24:737).

⁹⁴ *United States v. Harris*, 106 U. S. 629, 644 (27:290); *Baldwin v. Franks*, 120 U. S. 678, 707 (30:766); *Logan v. United States*, 144 U. S. 263, 310 (36:429).

of servitude;" and that, "The congress shall have power to enforce this article by appropriate legislation."

This amendment does not confer upon any person, or class of persons, or persons of any race the right to exercise the elective franchise; it simply prohibits the United States and the several states from discriminating against any person in respect to that right on account of race, color or previous condition of servitude, and gives congress the power to enforce the prohibition by appropriate legislation.⁹⁵

§ 326. **The right to vote derived from the state.**—The right to vote in the states comes from the states;⁹⁶ and the right to vote which was intended to be protected by the fifteenth amendment, is the right to vote as established by the laws and constitution of the state.⁹⁷

§ 327. **The fifteenth amendment a limitation upon the federal and state governments.**—The first section of the fifteenth amendment to the federal constitution is a limitation or prohibition upon the federal and state governments; it has reference to state and federal action, and not to any action of private individuals.⁹⁸ And a federal statute which enacts that "every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guarantied by the fifteenth amendment to the constitution of the United States, by means of bribery, or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished" as for a criminal offense, cannot be sustained as an appropriate exercise of the power conferred by the fifteenth amendment upon congress to enforce the limitation upon the states therein contained, and such statute is unconstitutional.⁹⁹

⁹⁵ United States v. Reese, 92 U. S. 214, 256 (23:563); United States v. Cruikshank, 92 U. S. 542, 569 (23:588); Minor v. Happersett, 21 Wall. 162, 178 (22:627); James v. Bowman, 190 U. S. 127, 142 (47:979); Pope v. Williams, 193 U. S. 621, 634 (48:817).
⁹⁶ United States v. Reese, 92 U. S. 214, 256 (23:563); United States v. Williams, 193 U. S. 621, 634 (48:817).
⁹⁷ McPherson v. Blacker, 146 U. S. 1, 42 (36:869).
⁹⁸ United States v. Reese, 92 U. S. 214, 217 (23:563); James v. Bowman, 190 U. S. 127, 142 (47:979).
⁹⁹ James v. Bowman, 190 U. S. 127, 142 (47:979).

⁹⁶ United States v. Cruikshank, 92 U. S. 542, 569 (23:588); Pope v. Williams, 193 U. S. 621, 634 (48:817).
⁹⁷ McPherson v. Blacker, 146 U. S. 1, 42 (36:869).
⁹⁸ United States v. Reese, 92 U. S. 214, 217 (23:563); James v. Bowman, 190 U. S. 127, 142 (47:979).
⁹⁹ James v. Bowman, 190 U. S. 127, 142 (47:979).

§ 328. Same—The only inhibited abridgment is one based on race, color or previous condition of servitude.—A denial or abridgement of the right of citizens of the United States to vote must, in order to be in violation of the amendment, be one which is made “on account of race, color, or previous condition of servitude.” The power of congress to legislate at all upon the subject of voting at state elections rests upon this amendment; the amendment does not confer upon congress authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections; it is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that congress can interfere and provide for its punishment. And a penal statute enacted by congress, for the purpose of enforcing the inhibition of the fifteenth amendment, which is in general language broad enough to cover wrongful acts without as well as within its constitutional power, can not be limited by judicial construction so as to make it operate only on that which congress may rightfully prohibit and punish.¹

(i) LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

§ 329. No state to pass law impairing obligation of contracts—Prohibition upon the states—Method of enforcement.—It is declared by the constitution that: No state shall pass any “law impairing the obligation of contracts.”² This is a pro-

¹ United States v. Reese, 92 U. S. 214, 217 (23:563); James v. Bowman, 190 U. S. 127, 142 (47:979); Pope v. Williams, 193 U. S. 621, 634 (48:817); United States v. Cruikshank, 92 U. S. 542, 569 (23:588). “It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will

when ascertained, if within the constitutional grant of power. Within its legitimate sphere, congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people.” Chief Justice Waite in United States v. Reese, supra.

² U. S. Const. Art. II. sec. 10.

hibition on the states, and has always been enforced under the twenty-fifth section of the original judiciary act, by writ of error from the supreme court of the United States to the highest courts of the states, in cases involving state statutes alleged to be repugnant to the constitutional provision, where such statutes have been upheld by the highest courts of the state.³

§ 330. Same—Same—Power of United States circuit courts to declare such statutes void.—The circuit courts of the United States have the power, in suits originally brought before them, or removed into them from state courts, to declare void any state statute which is repugnant to the contract clause of the federal constitution, if the validity of such statute be in issue in the suit. The first case arising under the contract clause of the constitution was originally brought in the circuit court of the United States for the district of Massachusetts, which held void a statute of the state of Georgia because it impaired the obligation of a contract made by that state, and the decision of the circuit court was, upon writ of error, affirmed by the supreme court of the United States; and since that decision, the jurisdiction of the federal circuit courts to declare invalid state statutes which are repugnant to the contract clause of the constitution has been regarded as beyond question.⁴

§ 331. The federal supreme court will determine for itself whether there is a contract, and whether its obligation is impaired.—Upon writ of error, in reaching a conclusion on the question whether the judgment of the supreme court of a state has given effect to a law of the state which, in violation of the constitution of the United States, impairs the obligation of a contract, the supreme court of the United States will decide

³ Dartmouth College v. Woodward, 4 Wheat. 518, 715 (4:629); Curran v. Arkansas, 15 How. 304, 322 (14:705); Walker v. Whitehead, 16 Wall. 314 (21:357); U. S. v. Quincy, 4 Wall. 535 (18:403); Louisiana v. St. Martin's Parish, 111 U. S. 716 (28:574); Houston & Texas Central Railroad Co. v. State of Texas, 177 U. S. 66, 103 (44:673).

⁴ Fletcher v. Peck, 6 Cranch, 87;

148 (3:162); Green v. Biddle, 8 Wheat. 1, 108 (5:547); Sturges v. Crownshield, 4 Wheat. 122, 208 (4:529); Ogden v. Saunders, 12 Wheat. 214, 369 (6:606); Bronson v. Kinzie, 1 How. 311, 332 (11:143); McCracken v. Hayward, 2 How. 608, 619 (11:397); Shapleigh v. San Angelo, 167 U. S. 646 (42:310); Bedford v. Eastern Bldg. & L. Assn., 181 U. S. 227 (45:834).

for itself, independently of the decision of the state court, (1) whether there is a contract, and (2) whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of state constitutions and laws, the supreme court of the United States is not necessarily governed by previous decisions of the state court upon the same or similar points, except where they have been so firmly established as to constitute a rule of property.⁵

§ 332. Contract defined.—A contract is a compact between two or more parties, and is either executed or executory. A contract executed is one in which everything that was to be done is done, and nothing remains to be done, and the object of the contract is performed and accomplished; and such a contract requires no consideration to support it. A consummated gift is as valid in law as a contract made upon a valuable consideration. A grant actually made is an executed contract. An executory contract is one in which it is stipulated, upon a sufficient consideration, that something is to be done or not to be done by one or both of the parties. A contract executed, as well as one which is executory, contains obligations binding on the parties. An executed contract divests the parties of the rights, titles and estates which they, respectively, by such contract have granted away or parted with, and imposes on them an obligation not to re-assert such rights, titles and estates. A grant estops the grantor, and imposes on him a continuing obligation not to assert any right in opposition to his own grant and relinquishment. The constitutional inhibition against the impairment of the obligation of contracts applies alike to both executory and executed contracts, by whomsoever made.⁶

⁵ *Louisville & Nashville Railroad Co. v. Palmes*, 109 U. S. 244, 258 (27:922); *Bank v. Knoop*, 16 How. 369, 391 (14:977); *Louisville Gas Co. v. Citizens Gas Light Co.*, 115 U. S. 638, 700 (29:510); *Vicksburg, Shreveport & Pacific R. R. Co. v. Dennis*, 116 U. S. 665, 671 (29:770); *Wright v. Nagle*, 101 U. S. 791, 797 (25:921); *Bank v. Skelly*,

1 Black, 436, 450 (17:173); *Bryan v. Board of Education*, 151 U. S. 639, 658 (38:297); *Mobile & Ohio R. Co. v. Tennessee*, 153 U. S. 486, 509 (38:793); *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 161 (40:651).

⁶ *Fletcher v. Peck*, 6 Cranch, 87, 143 (3:162); *Green v. Biddle*, 8 Wheat. 1, 108 (5:547); *Davis v.*

§ 333. Same—Charters of private corporations.—Every provision of the charter of a private corporation granting to the incorporators any valuable right, privilege or franchise, and which conduced to an acceptance of the charter and an organi-

Gray, 16 Wall. 203, 233 (21:447); *Farrington v. Tennessee*, 95 U. S. 679, 694 (24:558).

In *Fletcher v. Peck*, *supra*, which involved the validity of an act of the state of Georgia, attempting to annul a grant of lands previously made by that state, Chief Justice Marshall, delivering the opinion of the court, said:

"Does the case now under consideration come within this prohibitory section of the constitution? In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since, then, in fact, a grant is a contract executed, the obligation

of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand siezed of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

"If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made by itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

"Whatever respect might have been felt for the state sovereign-

zation under it, is a contract within the meaning of the contract clause of the constitution and is protected by it, unless the power to change the charter is reserved in the charter itself, or in some constitutional or statutory provision;⁷ and this is true although the corporation engages in a public business, such as the business of a public carrier, and its property is affected with a public interest.⁸

ties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state. No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?"

In *Farrington v. Tennessee*, *supra*, Mr. Justice Swayne, delivering the opinion of the court, said:

"Contracts are executed or execu-

tory. A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both of the parties. Only a slight consideration is necessary. The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong."

⁷ *Dartmouth College v. Woodward*, 4 Wheat. 518 (4:629); *Bank v. Knook*, 16 How. 369, 415 (14:977); *Bridge Co. v. Bridge Co.*, 3 Wall. 51 (18:137); *Davis v. Gray*, 16 Wall. 203 (21:447); *Home of Friendless v. Rouse*, 8 Wall. 430 (19:495); *Gordan v. Appeal Tax Court*, 3 How. 133 (11:529); *Washington University v. Rouse*, 8 Wall. 439 (19:498); *St. Anna's Asylum v. New Orleans*, 105 U. S. 362 (26:1128); *Farrington v. Tennessee*, 95 U. S. 679, 694 (24:558).

⁸ *Davis v. Gray*, 16 Wall. 203 (21:

§ 334. Same—Same—Rule for construing legislative grants. In construing legislative grants, that construction must be adopted which is most advantageous to the interests of the state. All rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the grant or charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants.*

§ 334a. The prohibition protects all contracts, without regard to their nature or the character of the parties.—The constitutional inhibition, forbidding the states to pass any “law impairing the obligation of contracts” uses the general term “contract,” without distinguishing between different kinds or classes of contracts or the character of parties entering into them, and the words of the provision contain no distinction or exception, but are general and applicable to contracts of every description and by whomsoever made: and, therefore, the inhibition protects all contracts, which are valid by the municipal law, without regard to their nature, classification, subject-matter, or the character of the parties who make and

447); *Willmington & W. R. R. Co. v. Reid*, 13 Wall. 264 (20:568); *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174 (32:377).

* *Chenango Bridge Co. v. Binghamton Bridge Co.*, 3 Wall. 51, 83 (18:137); *Hannibal and St. Joseph Railroad Co. v. Missouri River Packet Co.*, 125 U. S. 260, 273 (31:731); *Charles River Bridge v. Warren Bridge*, 11 Pet. 544 (9:822); *Dubuque & P. R. R. Co. v.*

Litchfield, 23 How. 66 (16:500); *Rice v. Minnesota & N. W. R. R. Co.*, 1 Black, 380 (17:153); *Leavenworth L. & G. R. R. Co. v. United States*, 92 U. S. 733 (23:634); *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 660 (24:1036); *Stein v. Beinsville Water Supply Co.*, 141 U. S. 67, 81 (35:622); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, 598 (41:560).

enter into them; it protects contracts whether executory or executed, express or implied, and whether they be contracts by legislative grant, or by matter of record, or by deed, or contracts without deed or simple contracts, as they are called at the common law; it protects contracts between private individuals, between the state and individuals, between the state and corporations, between corporations, between state and state, and between a state and the United States.

The inhibition against the impairment of contracts is associated in the text of the constitution with the other great constitutional inhibitions against the state—the inhibitions against the emission of bills of credit, the inhibition for the protection of the currency, and the inhibition against bills of attainder and *ex post facto* laws—in the adoption of which the people of the several states manifested a determination to effectually protect themselves, their lives, their fortunes and their property from “the effects of those sudden and strong passions to which men are exposed,” and which are liable to result in hasty and inconsiderate legislation; and there is nothing in the words of the contract clause nor in the context which implies an intention to except from its operation any character or class of valid contracts, and the universal current of authority is that there are no such exceptions.¹⁰

¹⁰ U. S. Const. art. 1, sec. 10; *Fletcher v. Peck*, 6 Cranch. 87, 148 (3:87); *Green v. Biddle*, 8 Wheat. 92 (5:547); *Dartmouth College v. Woodward*, 4 Wheat. 627 (4:629); *Sturges v. Crowninshield*, 4 Wheat. 197 (4:529); *Ogden v. Saunders*, 12 Wheat. 317 (6:606); *Chenango Bridge Co. v. Binghamton Bridge Co.*, 3 Wall. 51 (81:137); *Davis v. Gray*, 16 Wall. 203 (21:447); *Bank v. Knoop*, 16 How. 369 (14:977); *Bridge Proprietors v. Hoboken L. & I. Co.*, 1 Wall. 116 (17:571); *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674 (29:525); *New Orleans Gas Light Co. v. Louisiana Light & Heat, etc Co.*, 115 U. S. 650 (29:516); *Louisville Gas Co. v. Citizen's Gas Light Co.*, 115 U. S. 683 (29:510); *McGehee v. Mathis*, 4 Wall. 143 (18:314); *Davis v. Gray*, 16 Wall. 203 (21:447); *Gordon v. Appeal Tax Court*, 3 How. 133 (11:529); *St. Anna's Asylum v. New Orleans*, 105 U. S. 362 (26:1128); *Home of Friendless v. Rouse*, 8 Wall. 430 (19:495); *Wilmington & W. R. R. Co. v. Reid*, 13 Wall. 264 (20:568); *Walker v. Whitehead*, 16 Wall. 314 (21:357); *Curran v. Arkansas*, 15 How. 304 (14:705); *McCracken v. Hayward*, 2 How. 608 (11:397); *Louisiana v. St. Martin's Parish*, 111 U. S. 716 (28:574); *Van Hoffman v. Quincy*, 4 Wall. 535 (18:403); *Gunn v. Barry*, 15 Wall. 610 (21:212); *Louisiana v. New Orleans*, 102 U. S. 203 (26:132); *Clay*

§ 334b. **Marriage not within the prohibition.**—The constitutional inhibition forbidding the states to pass laws impairing the obligation of contracts was not intended to restrict the right of the legislatures of the state to legislate upon the subject of divorce; marriage is a social relation, and is not a contract within the meaning of the prohibition.¹¹

County v. Society for Savings, 104 U. S. 579 (26:856); Red Rock v. Henry, 106 U. S. 596 (27:251); Boyce v. Tabb, 18 Wall. 546 (21:757); White v. Hart, 13 Wall. 646 (20:685); Cleveland, etc., R. R. Co. v. Pennsylvania, 15 Wall. 300 (21:179); Pittsburg, etc R. R. Co. v. Pennsylvania, 15 Wall. 326 (21:189); Farrington v. Tennessee, 95 U. S. 679 (24:558); Dodge v. Woolsey, 18 How. 331 (15:401); Bank v. Thomas, 18 How. 384 (15:460); Bank v. Skelly, 1 Black, 436 (17:173); Bank v. Ohio, 1 Black, 474 (17:180); New Jersey v. Yard, 95 U. S. 104 (24:352); Effinger v. Kenney, 115 U. S. 566 (29:495); Pacific R. R. Co. v. Maguire, 20 Wall. 36 (22:282); Northwest University v. People, 99 U. S. 309 (25:387); Bank v. Billings, 4 Pet. 560 (7:939); Hartman v. Greenhow, 102 U. S. 679 (26:271); Wolff v. New Orleans, 103 U. S. 367 (26:395); Hall v. Wisconsin, 103 U. S. 8 (26:302); Houston & Texas Central R. Co. v. Texas, 177 U. S. 66 (44:673); Barnitz v. Beverly, 163 U. S. 118 (41:93).

¹¹ Maynard v. Hill, 125 U. S. 190, 216 (31:654); Hunt v. Hunt, 97 U. S. 564, 565 (24:1109); Dartmouth College v. Woodward, 4 Wheat. 518, 715 (4:629).

In Maynard v. Hill, *supra*, Mr. Justice Field, delivering the opinion of the court, and reviewing and quoting from the authorities, stated the *ratio decidendi* substantially as follows:

"It is also to be observed that, whilst marriage is often termed by the text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or changed, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

"When the contracting parties have entered into the marriage state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was a contract that

§ 335. "**Obligation of contracts**" defined.—The "obligation of contracts," within the meaning of the contract clause of the constitution, implies both (1) validity and (2) remedy. The inhibition protects from impairment (1) the legal validity of the contract itself, and the rights created by its terms and stipulations, and the duty of performance imposed by its engagements, and (2) the means and remedies for the enforcement of the contract, as established and defined, substantially, by the municipal law of the state, at the time when, and with reference to which, the contract was made. The idea of validity and remedy are inseparable, and both are parts of the obligation protected by the constitution. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract, by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation.¹²

the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.

"It is not, then, a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligation of which arises not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness

of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.

"Marriage is more than a contract; it is the most elementary and useful of all the social relations, is regulated and controlled by the sovereign power of the state, and cannot, like mere contracts, be dissolved by the mutual consent of the contracting parties, but may be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; and being more than a contract, and depending especially upon the sovereign will, it is not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts."

¹² Walker v. Whitehead, 16 Wall. 314 (21:357); White v. Hart, 13 Wall. 646, 654 (20:685); Van Hoffman v. Quincy, 4 Wall. 535 (18:403); Louisiana v. St. Martin's Parish, 111 U. S. 716 (28:574);

§ 336.—**Same—Axioms in American jurisprudence.**—The supreme court of the United States, speaking by Mr. Justice Swayne, has announced the following axioms in American jurisprudence relating to contracts, namely:

(1) The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the constitution against impairment. (2) The obligation of a contract is the law which binds the parties to perform their agreement. (3) Any impairment of the obligation of a contract (the degree of the impairment is immaterial), is within the prohibition of the constitution. (4) The states may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way, than to attack its validity in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made. The guaranty of the constitution gives it protection to that extent.¹³

§ 337. **Changing the remedy.**—“Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the

McCracken v. Hayward, 2 How. 608 (11:397); Curran v. Arkansas, 15 How. 304 (14:705); Dartmouth College v. Woodward, 4 Wheat. 518 (4:629); Gunn v. Barry, 15 Wall. 610 (21:212); Louisiana v. New Orleans, 102 U. S. 203 (26:132); Edwards v. Kearzey, 96 U. S. 596, 611 (24:793); Bronson v. Kinzie, 1 How. 311 (11:143); Brine v. Hartford F. Ins. Co., 96 U. S. 327 (24:858); Tennessee v. Sneed,

96 U. S. 69 (24:610); Seibert v. United States, 122 U. S. 284 (30:1163); Barnitz v. Beverly, 163 U. S. 118, 132 (40:93); Cleveland, etc. R. R. Co. v. Pennsylvania, 82 U. S. 300, 326 (21:179); Murray v. Charleston, 96 U. S. 432, 449 (24:760).

¹³ Walker v. Whitehead, 16 Wall. 314, 318 (21:357); United States v. Quincy, 4 Wall. 535, 555 (18:403).

contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution.”¹⁴ The legislature has the control of the modes of proceedings and the forms of procedure to enforce contracts, and may alter them, provided it furnishes a remedy which is complete and which secures all the substantial rights of the parties to contracts.¹⁵ It is a settled rule that the laws which prescribe the mode of enforcing a contract, which are in existence when and where a contract is made and is to be performed, are so far a part of the contract that no changes in those laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States.¹⁶

§ 338. Same—Rule stated by Mr. Justice Bradley.—In a case decided by the supreme court of the United States at the October Term, 1889, Mr. Justice Bradley stated the rule on this subject as follows:

“It is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not apply an alternative remedy equally adequate and efficacious.”¹⁷

§ 339. Change in statute of limitations.—It is the settled doctrine that state legislatures may prescribe a limitation for the bringing of suits where none previously existed, as well as

¹⁴ *Bronson v. Kinzie*, 1 How. 311 (11:143); *McCracken v. Hayward*, 2 How. 608 (11:398); *Howard v. Bugbee*, 24 How. (16:753); *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627 (24:858); *Selbert v. United States*, 122 U. S. 284 (30:1163); *Louisiana v. New Orleans*, 102 U. S. 203 (26:132); *Barnitz v. Beverly*, 163 U. S. 118, 132 (41:93).

¹⁵ *Tennessee v. Sneed*, 96 U. S. 69 (24:610); *Barnitz v. Beverly*, 163 U. S. 118 (41:93).

¹⁶ *Brine v. Hartford F. Ins. Co.*, 96 U. S. 627 (24:858); *Barnitz v. Beverly*, 163 U. S. 118 (41:93);

McGahey v. Virginia, 135 U. S. 662 (34:304).

¹⁷ *McGahey v. Virginia*, 135 U. S. 662 (34:304); citing *Bronson v. Kinzie*, 1 How. 311 (11:143); *Woodruff v. Trapnall*, 10 How. 190. (13:383); *Furman v. Nichol*, 8 Wall. 44 (19:370); *Walker v. Whitehead*, 16 Wall. 314 (21:357); *Von Hoffman v. Quincy*, 4 Wall. 535 (18:403); *Tennessee v. Sneed*, 96 U. S. 69 (24:610); *Memphis v. United States*, 97 U. S. 293 (24:920); *Memphis v. Brown*, 97 U. S. 300 (24:924); *Howard v. Bugbee*, 24 How. 461 (16:753).

shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suits before the bar takes effect. The passage of a new statute of limitations giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the constitution, provided a reasonable time is given for the bringing of such actions.¹⁸

§ 340. **Judgment for tort not a contract.**—A judgment recovered upon a liability for a tort, created by statute, is not a contract within the meaning of the constitutional provision forbidding state legislation impairing its obligation, for the reason that the term “contract” is used in the constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other to do or not to do certain acts; and a state law taking away the means and remedy of collecting such a judgment is not within the constitutional inhibition.¹⁹

§ 341. **Withdrawing the power of taxation from municipal corporations impairs contract, when.**—When a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of a contract in this way than in any other way.²⁰

¹⁸ *Wheeler v. Jackson*, 137 U. S. 245 (34:569); *McGahey v. Virginia*, 135 U. S. 662 (34:304); *Terry v. Anderson*, 95 U. S. 628, 632 (24:365); *Koshkonong v. Burton*, 104 U. S. 668, 675 (26:886); *Mitchell v. Clark*, 110 U. S. 633, 643 (28:279).

¹⁹ *Louisiana v. New Orleans*, 109 U. S. 285 (27:936); *Chase v. Cur-*

tis, 113 U. S. 452, 464 (28:1038); *Freeland v. Williams*, 131 U. S. 405 (33:193).

²⁰ *Van Hoffman v. Quincy*, 4 Wall. 535 (18:403); *Galena v. United States*, 5 Wall. 705, 710 (18:560); *United States v. New Orleans*, 103 U. S. 358 (26:395); *Ralls County v. United States*, 105 U. S. 733 (26:1220); *Louisiana v. Police*

§ 342. **Increasing exemptions from execution sales.**—A law of the state increasing the exemptions of property of debtors from seizure and sale under execution is unconstitutional as to contracts made before the passage of such law.²¹

§ 343. **Laws altering terms of contracts.**—A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law impairing its obligation.²² And a state statute which, in an effort to tax the bonds of corporations held by non-residents, requires the corporations doing business within its limits and which pay interest to their bondholders or other creditors, to pay a part of that interest to the state for taxes upon the bonds, is void.²³

§ 344. **What are laws.**—The constitution of a state is a law of the state within the meaning of the constitution of the United States, prohibiting states from passing laws impairing the obligation of contracts.²⁴

§ 345. **Same—Judicial decisions.**—In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state or some provision of the state constitution, and not by a decision of its judicial department only. The supreme court of the United States is not authorized to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. The appellate jurisdiction of the supreme court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only

Jury, 111 U. S. 716 (28:574); Louisiana v. St. Martin's Parish, 111 U. S. 716 (28:574); Mobile v. Watson, 116 U. S. 289 (29:620); Wolff v. New Orleans, 103 U. S. 358 (26:395).

²¹ Edwards v. Kearzey, 96 U. S. 595, 611 (24:793).

²² Murray v. Charleston, 96 U. S. 432 (24:760); Cleveland, etc., R. R. Co. v. Pennsylvania, 15 Wall. 300, 326 (21:179).

²³ Cleveland, etc., R. R. Co. v. Pennsylvania, 15 Wall. 300, 326 (21:179).

²⁴ Bier v. McGehee, 148 U. S. 137 (37:397); Mississippi & M. R. R. Co. v. McClure, 10 Wall. 511 (19:997); Bank v. Thomas, 18 How. 384 (15:460); White v. Hart, 13 Wall. 646 (20:685); Delma v. Merchants Mut. Ins. Co., 14 Wall. 661 (20:757); Gunn v. Barry, 15 Wall. 610 (21:412),

when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court.²⁵

§ 346. **Same—Same—Change of state decision.**—The contract clause of the constitution cannot be invoked against a change in the decisions of the highest court of a state.²⁶ It is now definitely settled that a contract can be impaired within the meaning of this clause of the constitution, so as to give the supreme court of the United States jurisdiction upon writ of error to review the judgment of a state court, only by some subsequent act of the legislative power of the state or some provision of the state constitution which has been upheld and given effect by the state court.²⁷

§ 347. **Same—Same.**—If a contract, when made, is valid by the constitution and laws of the state, as then expounded by the highest authorities of the state whose duty it is to administer them, no subsequent action by the legislature or the judiciary can impair its obligation.²⁸

§ 348. **The constitutional inhibition prospective only.**—The inhibition of the constitution against impairing contracts is wholly prospective. The states may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effects.²⁹

²⁵ *Central Land Co. v. Laidley*, 159 U. S. 103, 112 (40:91); *Bank v. Buckingham*, 5 How. 317, 343 (12:181); *Lawler v. Walker*, 14 How. 149, 154 (14:364); *Leigh Water Co. v. Easton*, 121 U. S. 388, 392 (30:1059); *New Orleans Water Works Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 30 (31:607); *Brown v. Smart*, 145 U. S. 454 (36:773); *Wood v. Brady*, 150 U. S. 18 (37:987); *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511, 515 (19:997); *Knox v. Exchange Bank*, 14 Wall. 661, 665 (20:757); *University v. People*, 99 U. S. 309, 319 (25:387); *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 587 (28:1084); *Hanford v. Davies*, 163 U.

S. 273 (41:157); *Bacon v. Texas*, 163 U. S. 207 (41:132); *National Mutual Building & Loan Asso. v. Brahan*, 193 U. S. 635, 651 (48:823).

²⁶ *National Mutual Building & Loan Asso. v. Brahan*, 193 U. S. 635, 651 (48:823).

²⁷ *Bacon v. Texas*, 163 U. S. 207 (41:132).

²⁸ *Havemeyer v. Iowa County*, 3 Wall. 294 (18:38); *Gelpeck v. Dubuque*, 1 Wall. 175 (17:520); *Chicago v. Sheldon*, 9 Wall. 50 (19:594); *Olcott v. Fond du Lac County*, 16 Wall. 678 (21:382).

²⁹ *Edwards v. Kearzey*, 96 U. S. 595 (24:793); *Denny v. Bennett*, 128 U. S. 489, 503 (32:491); *Mississippi & M. R. Co. v. Rock*, 4 Wall.

(j) NO STATE TO EMIT BILLS OF CREDIT.

349. Bills of credit defined.—The states are forbidden by the constitution to “emit bills of credit.”³⁰ Bills of credit are paper issued by a state, upon its faith, designed to circulate as money, and to be received and used as such in the ordinary business of life, redeemable at a future day.³¹ A warrant drawn by the state authorities in payment of an appropriation made by the legislature, when the warrant is payable upon presentation if there be funds in the treasury, and which has been issued to an individual in payment of the debt of the state to him, is not a bill of credit or treasury warrant intended to circulate as money.³²

§ 350. Same—Defined by Chief Justice Marshall.—“The word ‘emit’ is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated ‘bills of credit.’ To ‘emit bills of credit’ conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purpose, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.”³³

(k) BILLS OF ATTAINDER AND EX POST FACTO LAWS.

§ 351. Bills of attainder and ex post facto laws.—Both the federal and state governments are forbidden by the constitution to pass bills of attainder or *ex post facto* laws;³⁴ and these subjects have been treated in the chapter next preceding in the discussion of the constitutional limitations upon the federal government.³⁵

177 (18:381); *Northwestern University v. People*, 99 U. S. 309 (25:387); *Knox v. Exchange Bank*, 12 Wall. 379 (20:287, 414); *Brown v. Smart*, 145 U. S. 454, 459 (36:773).

³⁰ U. S. Const. art. 1, sec. 10.

³¹ *Craig v. Missouri*, 4 Pet. 410 (7:903); *Briscoe v. Bank of Kentucky*, 11 Pet. 257 (9:709); *Woodruff v. Trapnall*, 10 How. 190, 205 (13:383); *Darrington v. Branch of The Bank of Alabama*, 13 How. 12

(14:30); *Poindexter v. Greenhow*, 114 U. S. 270, 283 (29:185); *Houston & Texas Central R. Co. v. Texas*, 177 U. S. 66, 103 (44:673).

³² *Houston & Texas Central R. Co. v. Texas*, 177 U. S. 66, 103 (44:673).

³³ *Craig v. Missouri*, 4 Pet. 410 (7:903).

³⁴ U. S. Const. art. II. sec. 9 cl. 3, and sec 10, cl. 1.

³⁵ Ante, secs. 103, 104, 155-160.

(1) NO IMPOSTS OR DUTIES TO BE LAID BY THE STATES ON IMPORTS OR EXPORTS EXCEPT FOR EXECUTING INSPECTION LAWS.

§ 352. **The states prohibited from taxing imports and exports—Exception.**—Correlated to those provisions of the constitution which give the federal government power to regulate commerce, and to lay and collect duties and imposts, is the provision which declares that: “No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”³⁶ This provision is a necessary part of the constitutional scheme vesting the power to regulate commerce in the general government; and it was early held that a state law imposing a tax upon imports is not only repugnant to the above mentioned provision, but is also repugnant to the provision giving congress the power to regulate commerce.³⁷

§ 353. **Imports and exports defined.**—Within the meaning of the constitution, “imports” are articles of commerce, property or merchandise imported into the United States from a foreign country, and “exports” are articles of commerce, property or merchandise exported from the United States to a foreign country.³⁸

§ 354. **Impost defined.**—“Impost,” within the meaning of the constitutional prohibition is a duty, custom or tax levied on articles brought into the United States from a foreign country, or which are exported from this to a foreign country.³⁹

§ 355. **The inhibition does not apply to interstate shipments.** The constitutional inhibition against the laying of duties on imports and exports has no application to commerce between the states; it does not apply to articles of commerce, property, or merchandise brought into one state from another state. Imports, in the constitutional sense, embrace only those goods brought from a foreign country, and do not include merchandise shipped from one state to another; and the several states,

³⁶ U. S. Const. art. I, sec. 10, cl. 2.

³⁷ *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Woodruff v. Parham*, 8 Wall. 123 (19:382).

³⁸ *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Woodruff v. Parham*, 8 Wall. 123 (19:382); *Patapsco*

Guano Co. v. Board of Agriculture, 171 U. S. 345 (43:191); *Brown v. Houston*, 114 U. S. (29:257); *American Steel & Wire Co. v. Speed*, 192 U. S. 500 (48:538).

³⁹ *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Woodruff v. Parham*, 8 Wall. 123 (19:382).

not being controlled as to such merchandise by the prohibition against the taxation of imports, have the power, when the merchandise, so shipped from one state to another, has reached its destination and is held for sale or use, to tax it, without discrimination, like other property situated within the state is taxed. This is the settled doctrine upon the subject, and has been for years the basis of the taxing power in all the states of the Union.⁴⁰

§ 356. Right of the importer to sell in the original packages without taxation by the state.—As long as imports remain the property of the importer, and he has not acted upon them in such manner as to destroy their distinctive character as such, the state cannot tax them either directly or indirectly. A tax upon the sale of the imported article or the occupation of the importer is, within the meaning of the constitution, a tax upon the imported article itself.⁴¹ Under the revenue system of this country, the importer who has paid the duties imposed upon his imports by the general government, has the right to sell his imports in the original form or package in which they were imported, free from any burden or tax imposed by the state; but when the importer has sold the imported articles, or has broken the original package—box, case or bale—or has otherwise so acted upon them as to cause them to become incorporated or mixed with the general mass of property in the state, the goods at once lose their distinctive character as imports, and become from that time subject to state taxation.⁴²

§ 357. Same—Brown vs. Maryland.—This great and leading case, it is declared by the supreme court in a late case, established the following propositions:

“1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right to sell cannot be forbidden or impaired by a state.

“2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of

⁴⁰ Woodruff v. Parham, 8 Wall. 123 (19:382); Brown v. Houston, 114 U. S. 622 (29:257); American Steel & Wire Co. v. Speed, 192 U. S. 500 (48:538).

⁴¹ Brown v. Maryland, 12 Wheat. 419 (6:678); Cook v. Pennsylvania, 97 U. S. 566 (24:1015); War-

ring v. Mayor of Mobile, 8 Wall. 110 (19:342); May & Co. v. New Orleans, 178 U. S. 496 (44:1165).

⁴² Brown v. Maryland, 12 Wheat. 419 (6:678); Cook v. Pennsylvania, 97 U. S. 566 (24:1015); May & Co. v. New Orleans, 178 U. S. 496 (44:1165).

the importer, 'in his warehouse, in the original form or package in which it was imported,' is a duty on imports within the meaning of the constitution; and—

“3. That a state cannot, in the form of a license or otherwise, tax the right of the importer to sell, but when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the state in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.”⁴³

§ 358.—**Same—What is the “original package?”**—In legal contemplation, and in the sense of the judicial decisions on the subject, “the original package” is not the original wrapper put around each separate parcel or bundle of goods at the factory, but is the box, case, or bale, in which each separate parcel or bundle of goods is placed by the foreign seller, manufacturer or packer, for shipment, and in which the goods imported are shipped; and the moment when the box, case, or bale reaches its destination for use or trade, and is opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods loses its distinctive character as an import and becomes property subject to taxation by the state as other like property situated within its limits.⁴⁴

§ 359. **Tax on sales of imports made by auctioneer.**—A tax laid by a state on the amount of sales made by an auctioneer, is a tax on the goods sold; and where the goods sold, for which the auctioneer is required to collect and pay a tax, are imported goods in the original package, sold by him for the importer, the law of the state which authorizes the tax is void, because repugnant to the constitutional provision inhibiting the states from taxing imports and exports, and also repugnant to the constitutional provision vesting congress with the power to regulate commerce,⁴⁵

⁴³ May & Co. v. New Orleans, 178 U. S. 496 (44:1165).

⁴⁴ May & Co. v. New Orleans, 178 U. S. 496 (44:1165).

⁴⁵ Cook v. Pennsylvania, 97 U. S. 566, 575 (24:1015).

In the case here cited, Miller, Justice, delivering the opinion of

§ 360. Effect of a sale of imported articles.—Whilst importers selling the imported articles in the original packages are protected against state taxation, yet this privilege of exemption is not extended to the purchaser, for the reason that im-

the court, said: "The congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the states. If a tax assessed by a state injuriously discriminating against the products of a state of the union is forbidden by the constitution a similar tax against goods imported from a foreign state is equally forbidden.

"A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American constitution, cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting. States having fine harbors imposed unlimited taxes on all goods reaching the continent through their ports. The ports of New York and Boston were far behind Newport, in the state of Rhode Island, in the value of their imports; and that small state was paying all the expenses of her government by the duties levied on the goods landed at her principal port. And so reluctant was she to give up this advantage, that she refused for nearly three years after the other twelve original states had ratified the constitution, to give it her assent.

"In granting to congress the right to regulate commerce with foreign nations and among the several states, and with the Indian tribes, and in forbidding the

states without the consent of that body to levy any tax on imports, the framers of the constitution believed that they had sufficiently guarded against the dangers of any taxation by the states which would interfere with the freest interchange of commodities among the people of the different States, and by the people of the states with citizens and subjects of foreign governments.

"The numerous cases in which this court has been called on to declare void statutes of the states which in various ways have sought to violate this salutary restriction, show the necessity and value of the constitutional provision. If certain states could exercise the unlimited power of taxing all the merchandise which passes from the port of New York through those states to the consumers in the great west, or could tax, as has been done until recently, every person who sought the seaboard through the railroads within their jurisdiction, the constitution would have failed to effect one of the most important purposes for which it was adopted.

"A striking instance of the evil and its cure is to be seen in the recent history of the states now composing the German Empire. A few years ago they were independent states, which, though lying contiguous, speaking a common language, and belonging to a common race, were yet without a common government.

"The number and variety of

ported merchandise, by a sale and delivery, loses its distinctive character as an import, and becomes incorporated with the mass of property in the state, and subject to local taxation.⁴⁶

§ 361. **Duty on exports defined.**—A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation; and where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards.⁴⁷

§ 362. **Cost of executing inspection laws—Exception to inhibition.**—There is but one exception to the constitutional in-

their systems of taxation and lines of territorial division necessitating customs officials at every step the traveler took or merchandise was transported, became so intolerable, that a commercial, though not a political union was organized, called the German Zollverein. The great value of this became so apparent, and the community of interest so strongly felt in regard to commerce and traffic, that the first appropriate occasion was used by these numerous principalities to organize the common political government now known as the German Empire.

"While there is, perhaps, no special obligation on this court to defend the wisdom of the constitution of the United States, there is the duty to ascertain the purpose of its provisions, and to give them full effect when called on by a proper case to do so."

⁴⁶ *Waring v. Mayor of Mobile*, 8 Wall. 110, 123 (19:342). In the case here cited, the court, speaking through Clifford, Justice, said:

"Sales by the importer are held to be exempt from state taxation because the importer purchases,

by the payment of a duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the state. . . .

"Where the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer.

"Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import."

⁴⁷ *Brown v. Houston*, 114 U. S. 622, 635 (29:257).

hibition against state taxation of imports and exports. Each state may levy such tax on imports and exports as "may be absolutely necessary for executing its inspection laws." The inspection tax is an exception to the prohibition, contained in the very words thereof, and without which the tax would have been within the prohibition. It is a rule of interpretation that the exception of a particular thing from the general words of a constitutional provision or statute, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made.⁴⁸

(m) TONNAGE DUTIES.

§ 363. **The states prohibited from levying tonnage tax.**—The constitution declares: "No state shall, without the consent of congress, lay any duty of tonnage;"⁴⁹ and all state statutes in contravention of this prohibition are absolutely null and void.⁵⁰

§ 364. **Tonnage defined.**—Tonnage, in the United States law of commerce and navigation, is a vessel's entire internal cubical capacity, expressed in tons of one hundred cubic feet each, to be estimated and ascertained in the manner and by the rules prescribed by the act of congress.⁵¹

§ 365. **Tonnage tax defined.**—"A duty of tonnage within the meaning of the constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country."⁵² It has also been held that a statute of the

⁴⁸ *Brown v. Maryland*, 12 Wheat. 420 (6:678); *Turner v. Maryland*, 107 U. S. 38 (27:370). See note to *Turner v. Maryland*, *supra*, containing analysis of state inspection laws.

⁴⁹ U. S. Const. art. I, sec. 10, cl. 3.

⁵⁰ *Cox v. Lott*, 12 Wall. 204 (20:370); *Mobile Trade Co. v. Lott*, 12 Wall. 204, 220 (20:376); *Peete v. Morgan*, 19 Wall. 581 (22:201); *Cannon v. New Orleans*, 20 Wall. 522 (22:417); *Inman Steamship*

Co. v. Tinker, 94 U. S. 238 (24:118); *Southern Steamship Co. v. Masters of Port of New Orleans*, 6 Wall. 131 (18:749).

⁵¹ 13 U. S. Stat. at L. ch. 83, sec. 3, pp. 69-72, U. S. Rev. Stat. sec. 4153; *Cox v. Lott*, 12 Wall. 204, 220 (20:370); *Inman Steamship Co. v. Tinker*, 94 U. S. 238 (24:118).

⁵² *Huse v. Glover*, 119 U. S. 543 (30:478), opinion by Field, Justice; *Cox v. Lott*, 12 Wall. 204, 220 (20:370); *Mobile Trade Co. v. Lott*, 12 Wall. 221 (20:376); *Inman*

state of Louisiana, providing that the master and wardens of the port of New Orleans shall be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, from every vessel arriving in that port, imposed a tonnage tax.⁵³ In the course of the opinion in that case, it was said: "We think, also, that the tax imposed by the Act of Louisiana is, in the fair sense of the word, a duty on tonnage. In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain duty on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the states against levying duties on imports and exports, would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was, doubtless, intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum on its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. In this view of the case, the levy of the tax in question is expressly prohibited."⁵⁴

§ 366. **The prohibition applies to vessels employed in local commerce.**—The constitutional inhibition against state tonnage tax extends to all ships and vessels entitled to the privileges

Steamship Co. v. Tinker, 94 U. S. 238 (24:118); Cannon v. New Orleans, 20 Wall. 557 (22:417).

⁵³ Steamship Co. v. Port Wardens, 6 Wall. 31, 35 (18:749).

⁵⁴ Steamship Co. v. Port Wardens, *supra*.

"Tonnage, in our law, is a vessel's 'internal cubical capacity in tons of one hundred cubic feet each, to be ascertained' in the manner prescribed by congress. Act of May 6, 1864, 13 Stat. at L. 70, 72; R. S. 804, sec. 4153. 'Tonnage duties are duties upon vessels in proportion to their capacity.' The term was formerly applied to merchandise. Cowel,

in his Law Dictionary, published in 1708, thus defines it: 'Tonnage (tonnagium) is a custom or import paid to the King for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the Statutes of 12 Edw. IV, ch. 3; 6 Hen. VIII, ch. 14.' The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself." Swayne, Justice, in *Inman Steamship Co. v. Tinker*, *supra*.

of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states, or between different ports and places in the same state.⁵⁵

- § 367. **The prohibition does not extend to property tax on vessels.**—Ships and vessels owned by individuals and belonging to the commercial marine are the private property of their owners, and are not instruments or means of the federal government, and are within the taxing power of the states; and an *ad valorem* tax levied by a state on such ships and vessels, as property, owned by citizens of the state is not within the constitutional prohibition against the laying of duties of tonnage.⁵⁶

§ 368. **Charges for the use of local aids to commerce.—Wharfage.**—A reasonable compensation charged for the use of artificial facilities and local aids to trade and commerce, and conveniences furnished and assistance rendered to ships and vessels, is not a tonnage tax; and, therefore, wharfage, which is a charge against a vessel for using or lying at a wharf or landing, is not within the constitutional prohibition against the

⁵⁵ Cox v. Lott, 12 Wall. 204 (20:370); Mobile Trade Co. v. Lott, 12 Wall. 221 (20:376).

⁵⁶ Wheeling, Parkersburg and Cincinnati Transportation Co. v. City of Wheeling, 98 U. S. 273, 285 (25:412); Cox v. Lott, 12 Wall. 204 (20:370); Mobile Trade Co. v. Lott, 12 Wall. 221 (20:376).

“Power to impose taxes for legitimate purposes resides in the states as well as in the United States; but the states cannot, without the consent of congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of congress they are prohibited from exercising any such power. Outside of these prohibitions, the power of the state extends to all objects within their sovereign power, ex-

cept the means and instruments of the federal government.

“Taxes levied by a state upon ships or vessels as instruments of commerce and navigation are within the clause of the constitution which prohibits the states from levying any duty of tonnage without the consent of congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances, without the consent of congress. . . .

“Tonnage duties on ships by the states are expressly prohibited, but taxes levied by a state upon ships or vessels owned by citizens of the state as property, based on a valuation of the same as prop-

states laying tonnage duties, although the rates of wharfage charged are graduated by the size or tonnage of the vessel.⁵⁷

§ 369. **Same—Same.**—A charge for services rendered, or for conveniences provided, is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition of the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished to trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service.⁵⁸ The exaction of tolls by the state, from vessels passing through locks constructed by the state in a navigable river, is but a compensation for the use of artificial aids to commerce, constructed for the improvement of navigation, and not an impost upon the navigation of the stream.⁵⁹

§ 370. **Same—Same—What is not wharfage.**—A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in the bay, or landed at a natural river bank where there are no artificial facilities or constructions maintained as local aids to commerce, cannot be treated as a compensation for the use of a wharf; and an ordinance of the city of New Orleans which imposes upon all steamboats which shall moor or land in any part of the port of New Orleans certain levee fees measured by the tonnage of the vessel is a tonnage tax within the meaning of the

erty, are not within the prohibition, for the reason that the prohibition, when properly construed, does not extend to the investments of the citizens in such structures." Clifford, Justice, in *Wheeling, Parkersburg & Cincinnati Transportation Co. v. City of Wheeling*, 98 U. S. 273, 285 (25:412).

⁵⁷ *Transportation Co. v. Parkersburg*, 107 U. S. 691 (27:584); *Keokuk Northern Line Packet Co.*

v. Keokuk, 95 U. S. 80, 89 (24:376); *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423, 430 (25:688); *Huse v. Glover*, 119 U. S. 543, 550 (30:487); *Packet Co. v. Cattletsburg*, 105 U. S. 559 (26:1169); *Vicksburg v. Tobin*, 100 U. S. 430 (25:690).

⁵⁸ *Packet Co. v. Keokuk*, 95 U. S. 80 (24:377).

⁵⁹ *Huse v. Glover*, 119 U. S. 543, 550 (30:487).

provision of the federal constitution inhibiting the states from levying any tonnage tax, and is, therefore, void.⁶⁰

§ 371. Tonnage tax cannot be levied to defray cost of executing quarantine regulations.—The power to establish and execute quarantine laws and regulations resides in the states, and has not been surrendered to the general government. The source of this power is in the acknowledged right and impera-

⁶⁰ *Cannon v. New Orleans*, 20 Wall. 577 (22:417).

In deciding the case here cited, holding the ordinance of the City of New Orleans void, as being in conflict with the constitutional inhibition, Mr. Justice Miller, delivering the opinion of the court, said:

"We are of opinion that, upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring. In this view of the subject, as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the constitution, namely: 'That no state shall, without the consent of congress, lay any duty of tonnage.' Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a con-

tribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition. . . . In saying this we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier, owned by an individual or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation, to admit of a doubt that for the use of such structures, erected by individual enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted, also, that it is within the power of the state to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority.

"Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals."

tive duty of the state to provide for the preservation and protection of the health of its people, and although the power, when exercised, may in a greater or less decree affect commerce, yet such laws passed in the exercise of this power are not enacted for the purpose of affecting commerce. They are enacted for the sole purpose of preserving the public health, and if they injuriously affect commerce, congress, under the power to regulate it, may control the operation of such laws. Quarantine laws of necessity operate on vessels engaged in commerce, and may cause delay or inconvenience to such vessels and the commerce in which they are engaged, but they are still lawful and valid when they do not contravene any constitutional provision, or any constitutional enactment of congress. But while the state has the power to establish, maintain and execute, quarantine regulations, and to raise revenue necessary for that purpose, it is also true that no state can levy a tonnage tax upon ships and vessels entering its harbors in the pursuit of commerce, for the purpose of raising a revenue to meet the expenses of its quarantine regulations.⁶¹

§ 372. **Whether a charge is wharfage or a tonnage duty is a question of fact and law.**—Wharfage is a charge for the use of a wharf, made by the owner thereof by way of rent or compensation; while a duty of tonnage is a tax or duty charged for the privilege of entering or loading or lying in a port or harbor. Whether a charge is wharfage or a duty of tonnage, is a question, not of intent, but of fact and law; of fact, whether it is imposed for the use of a wharf, or for the privilege of entering a port; of law, whether according as the fact is shown to exist, it is wharfage or a duty of tonnage.⁶²

§ 373. **Whether wharfage is reasonable must be determined by the local law.**—It is a general rule of law that charges for the use of a public wharf must be reasonable; but this rule is established by the local municipal law, and by that law the question, whether wharf charges are reasonable or extortionate, must be determined. The reasonableness of wharf charges does not present a federal question, and a circuit court of the United States has no jurisdiction to entertain a bill in equity

⁶¹ Peete v. Morgan, 19 Wall. 581 (22:201).

⁶² Transportation Co. v. Parkersburg, 107 U. S. 691 (27:584).

for relief against exorbitant wharfage, as a case arising under the constitution and laws of the United States.⁶³

§ 374. Purpose and design of the constitutional prohibition against state tonnage duties.—The intent, purpose and design of the constitutional provision, prohibiting the states from laying tonnage duties, were to guard against local hindrances to commerce, trade and carriage by ships and vessels, and not to relieve them from liability to claims for assistance rendered, and facilities and local aids furnished to trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a state, a municipal corporation or a private individual; and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property.⁶⁴

⁶³ *Transportation Co. v. Parkersburg*, 107 U. S. 691 (27:584); *Packet Co. v. Aiken*, 121 U. S. 444 (30:978).

⁶⁴ *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80 (24:377).

CHAPTER VII.

THE FEDERAL JUDICIARY.

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ing obstructions to interstate commerce.

§ 398. Relation of the federal judiciary to the national peace.

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diary to domestic tranquility and peace.

§ 400. Territorial courts not courts of the United States.

401. The court of claims a special court.

§ 375. Judicial power requisite to the existence of government.—The judicial power is a co-ordinate constituent principle of all just civil government; and, in every well-constituted government, the judicial power must be co-extensive with the legislative power, and vested in a separate and distinct judicial department, capable of receiving and exercising jurisdiction in all cases arising under its constitution and laws, and of deciding all judicial questions arising out of them, and vested with the power of enforcing its judgments and decrees, whoever may be parties.¹

¹ *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Osborne v. Bank*, 9 Wheat. 738 (6:204); *Federalist*, Nos. XLVI and LXXX; 1 *Spirit of Laws* (Rev. Ed.) 151.

Montesquieu, in *The Spirit of Laws*, says: "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

"By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other sim-

ply the executive power of the state.

"The political liberty of the subject is tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legisla-

§ 376. The vital principle which supports written constitutions—The duty of the judiciary.—The vital principle in political science which supports all written constitutions, and which is essential to the existence of governments founded on them is that: A nation or political community in adopting a written constitution intends that it shall form and constitute the fundamental and paramount law of the land, and that all acts of the legislature repugnant thereto shall be absolutely null and void, and wholly inoperative for any purpose whatever; and the judicial department, as well as the other departments of the government, is bound by the constitution; and, it being the special province and duty of the courts to interpret and declare the law, the judiciary is bound, in all cases where a statute conflicts with the constitution, to pronounce such statute void.²

§ 377. The legislative, executive and judicial departments of government to be kept separate.—The legislative, executive and judicial departments of government ought to be kept separate and distinct, and each confided to a separate magistracy. The assembling of the whole power of these three departments, or any two of them, in the same hands, is subversive of the fundamental principles of free government. There can be no liberty under a government so constituted. But this principle is not violated by the trial of impeachments before the upper house of the legislature.³

§ 378. The confederacy under the articles of confederation was a league of sovereign states and not a government.—The “confederacy” under the articles of confederation was not a government, but “a league of friendship” of sovereign states, “for their common defense, the security of their liberties, and their mutual and general welfare,” in which each state retained its sovereignty, freedom and independence, and every
tor. Were it joined to the executive power the judge might behave with violence and oppression.

“There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing

the public resolutions, and of trying the causes of individuals.” 1 Spirit of Laws (Rev. Ed.) 151, 152.

² Marbury v. Madison, 1 Cranch, 137 (2:60); Federalist, No. LXXVIII.

³ Federalist, Nos. XLVI and XLVII; 1 Spirit of Laws (Rev. Ed.) book XI, pp. 149–182.

power, jurisdiction, and right, which was not by the confederation expressly delegated to the United States in congress assembled. The confederation had no power to legislate for the individual citizens of the country, but only for the states in their corporate or political capacity, and the concurrence of thirteen distinct sovereign wills was requisite for the full and complete execution of every important measure enacted by congress.⁴

§ 379. Same—No judiciary under the confederation.—The Articles of Confederation vested in congress the power of (1) appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of capture,⁵ and (2) of deciding in the last resort on appeal all disputes between two or more states concerning boundary, jurisdiction or any other cause whatever.⁶ This was the extent of the judicial power of the United States under that instrument, and the want of a federal judiciary has been declared to be the crowning defect of the confederation.⁷

§ 380. Same—The confederation had no power to enforce its laws.—The essential principle of government is the power

⁴ Articles of Confd. arts. II and III, 8 Fed. Stat. Anno. 7, 8; Federalist, Nos. XV and XVI; Gibbons v. Ogden, 9 Wheat. 1-240 (6:23, 81).

• In Gibbons v. Ogden, supra, Chief Justice Marshall said:

“As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their con-

gress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.”

⁵ Articles of Confd. art. IX, 8 Fed. Stat. Anno. 11; Penhallow v. Doane, 3 Dall. 54 (1:508); Doane v. Penhallow, 1 Dall. 218 (1:108).

⁶ Articles of Confd. art. IX, 8 Fed. Stat. Anno. 11; Federalist, No. VII.

⁷ Federalist, No. XXII.

to make and enforce laws. The only way in which the enforcement of laws can be effectuated is either (1) by the orderly and peaceful methods of judicial power, exercised through a duly organized judicial department of government, or (2) by force of arms. The confederacy did not possess the power to proceed in either way, and its measures amounted "to nothing more than advice or recommendations;" and while the league of states, sustained by the spirit of patriotism, was competent to successful revolution, yet, as a civil government, it was doomed to dismal failure.⁸

§ 381. The federal government created and invested with full judicial power.—When "that best oracle of wisdom, experience," had shown the "insufficiency of the * * * confederation to the preservation of the Union," and its destitution of "energy" had brought the country to "almost the last stage of national humiliation,"⁹ the people of the United States, acting, not as one consolidated community, but as the people of the states, each respectively, assembled in convention in their several states,¹⁰ "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to" themselves and their "posterity,"

⁸ Federalist, Nos. XV and XXII.

⁹ Federalist, No. XV.

¹⁰ *McCulloch v. Maryland*, 4 Wheat. 316, 403 (4:579, 600). In the opinion in this case Chief Justice Marshall said: "The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the con-

vention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments."

ordained and established the federal constitution;¹¹ and by the adoption of that instrument, the league of states was displaced, and a complete and symmetrical federal government was created and established,¹² with legislative, executive and judicial departments;¹³ and this government, so created, was, by the constitution, granted full judicial power, commensurate with all its possible needs, and sufficient for the execution of the great powers of government vested in it, and the enforcement of the limitations imposed upon the states by the creative instrument.¹⁴

§ 382. The limits of the judicial power defined in the constitution, but the power not distributed by it.—The limits of the judicial power of the United States are defined in the federal constitution; but that instrument did not, except in a few enumerated instances, applicable exclusively to the supreme court, distribute that judicial power, nor provide the detailed regulations for its appropriate exercise, devolving that duty on congress, in whom was vested, by express constitutional grant, the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States.¹⁵

§ 383. Same—Limits of the grant of judicial power.—The constitutional grant of judicial power to the United States is that: “The judicial powers shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime

¹¹ Preamble to Federal Const.

¹² *Gibbons v. Ogden*, 9 Wheat. 1-241 (6:23, 81).

¹³ *Martin v. Hunter's Lessees*, 1 Wheat. 304 (4:97); *Georgia v. Stanton*, 6 Wall. 50, 78 (18:721).

¹⁴ *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Martin v. Hunter's Lessees*, 1 Wheat. 304 (4:97); *Dartmouth College v. Woodward*, 4 Wheat. 518 (4:629); *McCulloch v. Maryland*, 4 Wheat. 316 (4:579); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Fletcher v.*

Peck, 6 Cranch, 87 (3:162); *Ableman v. Booth*, 21 How. 506, 526 (16:169); *U. S. v. Tarble*, 13 Wall. 379, 413 (20:597); *Re Debs*, 158 U. S. 564, 600 (39:1093); U. S. Const. art. III.

¹⁵ *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, 722 (9:1233, 1259); *Sheldon v. Sill*, 8 How. 441, 449 (12:1147, 1151); *Cary v. Curtis*, 3 How. 235, 245 (11:576, 581); *Martin v. Hunter's Lessees*, 1 Wheat. 304, 381 (4:97, 116); *Smith v. Jackson*, 1 Paine, 453, Fed. Cas. No. 13,064.

jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects.”¹⁶ And a further limitation is placed upon the power by the eleventh amendment which declares that: “The judicial power of the United States shall not be construed to extend to any suit at law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”¹⁷

§ 384. Same—Constitutional distribution of judicial power to the supreme court.—The constitution distributes a portion of the judicial power to the supreme court, declaring that in certain enumerated classes of cases its jurisdiction shall be original, and in others appellate. In the second section of the third article, it is declared that: “In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.”

It is not within the power of congress to vest in the supreme court original jurisdiction in other cases than those specified in the constitutional provision just quoted, although such cases be within the general grant of judicial power.¹⁸ In cases arising under the constitution, laws and treaties of the United States, the jurisdiction of the supreme court is appellate only; this is fixed by the distributive clause of the constitution. And although a state may be a party to a case which arises under the constitution, or a law, or a treaty of the United States, yet the jurisdiction of the supreme court in such case is appellate and not original. When the framers of the constitution declared, in the distributive clause that the jurisdiction shall be original in cases where a state shall be a party, and that it

¹⁶ U. S. Const. art. III.

¹⁷ XI art. of Amendt.

¹⁸ *Marbury v. Madison*, 1 Cranch,

137 (2:60); *Ex parte Yerger*, 8 Wall. 96, 97 (19:336).

shall be appellate in all cases arising under the constitution or laws, they designed to include in the first class those cases in which jurisdiction is given because a state is a party, and to include in the second class those cases in which jurisdiction is given because they arise under the constitution or laws. And, hence, it is, that writs of error lie from the supreme court of the United States, to the highest courts of the state, in cases of the second class, although the state itself may be a party.¹⁹

§ 385. The constitution requires the judicial power to be vested in a system of federal courts—Not in the state courts.—It is a principle of governmental science of universal application, that every government ought to contain within itself the means necessary to the full and complete execution of its own laws and the effectual enforcement of its own authority, without the aid, and free from the interference or control of all other governments, and courts of justice are the means most usually employed for the attainment of these ends; every government must repose upon its own courts, and not upon the courts of another government.²⁰ And, accordingly, the federal constitution expressly requires that the judicial power of the United States shall be vested in a system of courts established and organized by congress, pursuant to the authority vested in it by that instrument, and no part of that judicial power can be vested in the courts of the several states.²¹ The language of the constitution upon the point is that: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."²² But congress may authorize the judicial officers of the several states to exercise such powers and to perform such duties as are incidental to the judicial power, rather than a part of it, such as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, the naturalization of aliens, and to arrest deserting seamen and deliver them on board their vessels.²³

¹⁹ *Cohens v. Virginia*, 6 Wheat. 264 (5:257).

²⁰ *Cohens v. Virginia*, 6 Wheat. 264, 387, 388 (5:257, 287); *Federalist*, Nos. XV and XVI.

²¹ *Martin v. Hunter's Lessees*, 1 Wheat. 304, 335 (4:97, 105); *Hous-*

ton v. Moore, 5 Wheat. 1, 27 (5:19, 25); *Robertson v. Baldwin*, 165 U. S. 275 (41:715); *United States v. Lathrop*, 17 Johns. 4 (6:264).

²² U. S. Const. art. III, sec. 1.

²³ *Robertson v. Baldwin*, 165 U.

§ 386. **Same—"Inferior Courts" of the United States.**—The principles upon which the federal government was constructed, and the relations between that government and the state governments, required that the judicial power of the United States should be exercised in both (1) the original and (2) the appellate form; and the original jurisdiction of the supreme court having been limited by the constitution to a few classes of cases, and declared in all others to be appellate, it was necessary that the large residuum of original jurisdiction should be vested in other tribunals; and it was necessary that there should be in each state or district of the United States federal courts of original jurisdiction of federal causes; and it was, therefore, provided in the constitution that the congress should have power "to constitute tribunals inferior to the supreme court."²⁴

§ 387. **Constitutional provision securing the independence of the federal judiciary.**—The complete independence of the judges is requisite to the due and faithful administration of justice, and the stability of the government; and this is especially true in a government founded upon a written constitution, which imposes limitations upon the legislative power, and in consequence of which the judges will be called upon to declare void legislative enactments which are found to be repugnant to the fundamental law, a duty, the performance of which may, and often does, require high courage and an "independent spirit in the judges." Such independent judicial action is often necessary to prevent "dangerous innovations in the government," defeat efforts to subvert the constitution, and to protect the rights of the life, liberty and property of persons. The usual means of securing the independence of the judges are: (1) A permanent tenure of office, (2) a fixed provision for their support, which may not be diminished, but may be increased during their continuance in office, and (3) precautions for their responsibility.²⁵

The independence of the judges of the courts of the United States is secured by constitutional provision, namely: "The judges, both of the supreme and inferior courts, shall hold

²⁴ S. 275 (41:715); *Ex parte Gist*, 26 Ala. 156.

²⁵ U. S. Const. art. I, sec. 8, cl. 9.

²⁵ Hallam's Const. Hist. 597, 598; *Federalist*, Nos. LXXVIII

and LXXIX.

their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”²⁶

§ 388. The constitution mandatory upon congress to organize the federal judiciary.—The supreme court was created by the constitution; it exists by a direct grant to it of judicial power. That instrument declares that there shall be “one supreme court,” that a part of judicial power, both original and appellate, shall be vested in it, determines the mode of the appointment of the judges of the court, fixes their tenure of office, makes provision for their compensation, authorizes congress to ordain and establish other and inferior courts in whom shall be vested the residue of judicial power, and gives it power to make all laws necessary and proper for carrying into execution all powers vested by the constitution in the government of the United States. But, in the nature of things, the judicial system of the United States, which had been provided for in the constitution, could not be organized and its jurisdiction distributed, and the powers of the several courts defined and their exercise regulated, without legislative action; and the principle has long been settled that the constitution was mandatory upon congress to organize the supreme court, establish inferior courts, distribute the judicial power, regulate its exercise, and bring into operation the federal judiciary, consistently with the great outlines delineated in the fundamental law; and to suppose that congress could have declined to perform that duty, is to suppose that it could, by inaction, have defeated the constitution itself.²⁷

§ 389. Same—The federal judiciary organized by congress under the original judiciary act.—In obedience to the mandate of the constitution,²⁸ congress, by the original judiciary act,²⁹ passed at its first session after the adoption of the constitution, organized the supreme court, and defined its jurisdiction, original and appellate, consistently with the organic law, and divided the United States into judicial districts and judicial cir-

²⁶ U. S. Const. art. III, sec. 1.

²⁷ *Martin v. Hunter's Lessees*, 1 Wheat. 304 (4:97); *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233, 1259, 1262); *Sheldon v. Sill*,

8 How. 441 (12:1147); *Cary v. Curtis*, 3 How. 236 (11:577).

²⁸ *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233).

²⁹ 1 U. S. Stat. at L. ch. 20, pp. 73-79.

cuits, created district courts and circuit courts, defined their powers and jurisdiction, and regulated the exercise thereof, and gave to all the courts of the United States power to issue writs of *scire facias*, habeas corpus, and all other writs not specially provided for by statute, and which might be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and fully organized the federal judicial system and brought it into active operation.³⁰

§ 390. **Same—Creation of the United States circuit courts of appeals.**—All of the appellate judicial power of the United States was not vested by the constitution in the supreme court; appellate jurisdiction was given by that instrument to that court, in a designated class of cases, “with such exceptions and under such regulations as the congress shall make,” which left congress free to create inferior courts and vest in them a part of the appellate jurisdiction.³¹ And congress, by the act of March 3, 1891, in the exercise of its acknowledged power, and in order to facilitate the prompt disposition of cases in the supreme court, and to relieve it of the overburden of cases and controversies resulting from the rapid growth of the country and the steady increase of litigation, created in and for each circuit a circuit court of appeals, and transferred to them a large part of the appellate jurisdiction which had been theretofore vested in the supreme court, and distributed between the former and the latter the entire appellate jurisdiction over cases from the circuit and district courts of the United States.³²

§ 391. **The courts constituting the federal judicial system.**—The courts now constituting the federal judicial system, as provided for by the constitution are: (1) District courts; (2) circuit courts; (3) circuit courts of appeal; and (4) the supreme court. The first, second and third are, within the meaning of the constitution, inferior courts, constituted by congress, in the execution of the power invested in it by the constitution for that purpose.³³

³⁰ Rhode Island v. Massachusetts, 12 Pet. 657 (9:1233).

³¹ Martin v. Hunter's Lessees, 1 Wheat. 304 (4:97); U. S. Const. art. III, sec. 2, cl. 2.

³² McLish v. Robb, 141 U. S. 661 (35:893); Re Lau Ow Bew, 141 U.

S. 583 (35:868), S. C. 144 U. S. 47 (36:340); American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co., 148 U. S. 372, 378 (37:486); 26 U. S. Stat at L. ch. 517, p. 826.

³³ U. S. Const. art. I, sec. 8, cl. 9.

§ 392. **Same—Inferior courts not inferior in the common-law sense.**—The district courts, and circuit courts, and circuit courts of appeal of the United States, are not “inferior courts” in the common-law or technical sense; they are so only in the sense of the federal constitution, and in subordination to the supreme court; and their judgments and proceedings are not to be regarded and interpreted in the light of the common-law rules applicable to inferior common-law courts.³⁴

§ 393. **The jurisdiction of the federal judiciary is co-extensive with the legislative power.**—It is requisite to a free and balanced constitution, that there be a judicial department co-ordinate and co-extensive with the legislative power, vested with jurisdiction adequate to the enforcement of all legislative enactments, the administration of justice between parties claiming rights and immunities under the constitution and laws, and the execution of all the powers of government which can be rightfully exercised, in so far as these objects can be conveniently and legitimately accomplished through courts of justice.³⁵ The federal judiciary meets this requirement. It has exclusive jurisdiction of all criminal violations of the laws of the United States, whether committed on land or on the high seas; all suits for penalties and forfeitures under any law of the United States; all suits under the revenue and postal laws of the United States; all causes of admiralty and maritime jurisdiction, saving to suitors in all cases a common-law remedy where the common law is competent to give it; all prize causes; all suits brought by any alien for a tort only in violation of the laws of nations, or of a treaty of the United States; all suits against ambassadors and ministers; many classes of

³⁴ *Livingston v. Van Ingen*, 1 Paine, 45, Fed. Cas. No. 8,420; *Turner v. Bank of North America*, 4 Dall. 8 (1:718); *McCormick v. Sullivan*, 10 Wheat. 192 (6:300); *Kempe's Lessees v. Kennedy*, 5 Cranch, 173 (3:70); *Cutler v. Houston*, 158 U. S. 423, 431 (39:104); *Evers v. Watson*, 156 U. S. 527 (39:520); *Navigation Co. v. Homestead Co.*, 123 U. S. 552 (31:202); *Ex parte Cuddy*, 131 U. S. (33:154); *Ex parte Cooper*, 143 U. S. 472, 513 (36:232); *Dowell v. Applegate*, 152 U. S. 327, 346 (38:463).

³⁵ *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Osborn v. Bank*, 9 Wheat. 738 (6:204); *Marbury v. Madison*, 1 Cranch, 137 (2:60); *Federalist*, Nos. XLVI, XLVII, LXXVIII and LXXX; 1 *Spirit of Laws* (Rev. Ed.) 149-182.

civil actions arising under the laws of the United States;³⁶ suits to enforce the interstate commerce act,³⁷ and the anti-trust act;³⁸ matters in bankruptcy.³⁹ And it has concurrent jurisdiction with the state courts in a large class of civil cases arising under the constitution, laws and treaties of the United States, and cases based on diversity of citizenship, in which it administers the municipal laws of the states;⁴⁰ and exclusive jurisdiction of suits between states.⁴¹ This jurisdiction enables the government to punish all violations of its criminal laws, collect its revenues, execute the powers of government vested in it by the constitution, secure domestic tranquility,⁴² and control all matters affecting the relations of this country with foreign governments.⁴³

§ 394. The federal judiciary necessary to enforce the constitutional limitations upon the states.—The active principle⁴⁴ in republican governments based upon written constitutions requires that there shall be a peaceful and “constitutional method of giving efficacy to constitutional provisions,” and especially so in a complex system where there are several legislative bodies, legislating for distinct local communities, but restrained by constitutional limitations; and this object of giving efficacy to the fundamental law can be attained with greater uniformity and certainty, with better security to the life, liberty and property of the citizen, with less friction and better security of the public tranquility and preservation of the public faith, by the exercise of judicial power, through a competent, independent and efficient judiciary, than by any other

³⁶ U. S. Rev. Stat. secs. 563, 564, 629, 630, 687, 711, 3039, 4270, 4540, 4610, 4970, 5308, 5309, 5555; 4 Fed. Stat. Anno. 216–236, 245–251, 493–497; 1 U. S. Comp. Stat. 455–460, 501–517, 576–578.

³⁷ U. S. R. S. sec. 4386, 4389, 5258; 23 U. S. Stat. at L. ch. 60, sec. 6, pp. 31, 32; 24 U. S. Stat. at L. ch. 104, p. 379; 26 U. S. Stat. at L. ch. 128, p. 743; 25 U. S. Stat. at L. ch. 1063, p. 501; 27 U. S. Stat. at L. ch. 196, p. 531; Re Debs, 158 U. S. 564 (39:1092).

³⁸ 28 U. S. Stat. at L. ch. 349, sec. 73, 74, p. 570.

³⁹ U. S. R. S. sec. 630; 30 U. S. Stat. at L. ch. 541, p. 544.

⁴⁰ 18 U. S. Stat. at L. ch. 137, pp. 470, 473; 25 U. S. Stat. at L. ch. 866, p. 433.

⁴¹ U. S. R. S. sec. 687.

⁴² Re Debs, 158 U. S. 564 (39:1092).

⁴³ U. S. Rev. Stat. sec. 5283; United States v. The Three Friends, 166 U. S. 1, 83 (41:897, 925).

⁴⁴ 1 Spirit of Laws (Rev. Ed.) 19–22.

means.⁴⁵ And such were the means provided for in the federal constitution.⁴⁶

The people of the original thirteen states,⁴⁷ having, under “a firm league of friendship,”⁴⁸ achieved their independence by successful revolution, desiring to enter into a “more perfect union,” upon “reflection and choice,” established a complex polity, dividing the attributes of sovereignty between the state and federal governments, vesting in the former the powers of national sovereignty and reserving to the latter the powers of municipal sovereignty, and imposing upon the states important limitations; and declared that “this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding,” and that “the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution;”⁴⁹ and vested in the supreme court appellate jurisdiction in cases in law and equity arising under the constitution, laws and treaties of the United States, intending that this appellate jurisdiction should be exercised over the state courts, and that all provisions in the constitution of any state, and all laws enacted by any state legislature, which should be found by the supreme court, in the exercise of its jurisdiction, to be repugnant to “the supreme law of the land,” should be held and declared null and void. It was only in this way that the supremacy of the federal constitution could be maintained, and the Union preserved. Had not this principle been incorporated in the constitution, there could have been no uniformity in the construction of its provisions; there would have been as many different constructions as there were state courts of last resort, and it would have been both possible and practical for the states to have

⁴⁵ Federalist, No. LXXX; Cohens v. Virginia, 6 Wheat. 264, 448 (5:257); Re Debs, 158 U. S. 564, 600 (39:1092); Ableman v. Booth, 21 How. 506, 526 (16:169).

⁴⁶ U. S. Const. art. III.

⁴⁷ McCulloch v. Maryland, 4 Wheat. 316, 403, 404, 405 (4:597, 600, 601); Scott v. Sanford, 19 How. 393, 633 (15:691).

⁴⁸ Articles of Confed. art. II.

⁴⁹ U. S. Const. art. VI.

subordinated the federal constitution, laws and treaties to their own laws, to have annulled the limitations imposed upon them by that instrument, and to have effectually defeated the entire scheme of government embodied in it.⁵⁰ The appellate jurisdiction of the supreme court over the judiciary of the states in cases involving a federal question, and the power of that court to hold and declare void state laws when found by it to be in contravention of the federal constitution, and the laws and treaties made pursuant to it, were not an after-thought, fortuitously fallen upon subsequently to the organization of the government; but it was charged by the enemies, and admitted and justified by the friends of the constitution, while that instrument was pending before the country, that its adoption would be followed by such results.⁵¹

§ 395. The federal judiciary necessary to restrain federal legislation within constitutional limits.—The government of the United States, although sovereign and supreme within its appropriate sphere of action, is, nevertheless, a government of delegated, limited and enumerated powers, defined in the constitution, and neither its executive, legislative, nor judicial departments, can lawfully exercise any power in excess of the limits defined in the constitution; the provision that the “constitution, and the laws which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land,” is just as binding on the federal government, as it is on the states, and any legislation of congress not authorized by the constitution, or in contravention of it, is absolutely null and void.⁵² But, in order to restrain congress within con-

⁵⁰ Federalist, Nos. XXII, LXXX, LXXXI and LXXXII; *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Martin v. Hunter's Lessees*, 1 Wheat. 304, 382 (4:97); *Sturges v. Crowninshield*, 4 Wheat. 122, 209 (4:529); *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Dartmouth College v. Woodward*, 4 Wheat. 518 (4:629); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Ableman v. Booth*, 21 How. 506, 526 (16:169); *United States*

v. Tarble, 13 Wall. 397, 413 (20:597).

⁵¹ Federalist, Nos. LXXX, LXXXI and LXXXII; *Cohens v. Virginia*, 6 Wheat. 264 (5:257).

⁵² *McCulloch v. Maryland*, 4 Wheat. 316, 437 (4:579); *Ableman v. Booth*, 21 How. 506, 526 (16:169); *Scott v. Sandford*, 19 How. 393, 633 (15:691); *Marbury v. Madison*, 1 Cranch, 137 (2:60); *Hodges v. United States*, 203 U. S. 1-38 (51:65).

stitutional limits, and to avoid any legislation in excess of its power, it was necessary that there should be a tribunal vested with power, in the last resort, to pass upon the validity of such legislation, and, accordingly, the constitution vested in the supreme court final appellate jurisdiction in all cases arising under the constitution, laws and treaties of the United States, whether such cases originate in the state courts or in the inferior courts of the United States, and, as the final appellate tribunal, it is the duty of the supreme court to declare void and refuse to execute any act of congress brought before it and found to be in contravention of the constitution, and the court has, in a number of cases, exercised this power, and declared void congressional legislation, because in excess of the power conferred by the constitution upon the government, or in violation of some constitutional limitation imposed upon it for the protection and security of the life, liberty or property of the citizen.⁵³ The judicial power of the United States covers every legislative enactment of congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grant of the constitution; and this judicial power was justly regarded by the founders of the government as indispensable, not merely to maintain the supremacy of the constitution and laws of the United States, but also to guard the states from any encroachment, by the general government, upon their reserved rights.⁵⁴

§ 396. The federal judiciary necessary to peacefully maintain the supremacy of the federal constitution and the authority of the federal government.—In order that the scheme of government proposed and submitted by the constitutional convention should be free from the defects and deficiencies of the

⁵³ *United States v. Harris*, 106 U. S. 629 (27:290); *Civil Rights Cases*, 109 U. S. 3, 62 (27:836); *United States v. Reese*, 92 U. S. 214, 256 (23:563); *Ex parte Garland*, 4 Wall. 333, 339 (18:366); *Justices v. United States*, 9 Wall. 274, 282 (19:659); *United States v. Klein*, 13 Wall. 128, 150 (20:519); *Boyd v. United States*, 116 U. S. 616, 641 (29:746); *Scott v. Sanford*, 19 How. 393, 633 (15:691); *United States v. De Witt*, 9

Wall. 41, 45 (19:593); *United States v. Fox*, 95 U. S. 670, 673 (24:538); *United States v. Steffens*, 100 U. S. 82, 99 (25:550); *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 654 (39:759), S. C. 158 U. S. 601, 715 (39:1108); *Federalist*, No. LXXVIII; *Hodges v. United States*, 203 U. S. 1-38 (51:65).

⁵⁴ *Marbury v. Madison*, 1 Cranch, 137 (2:60); *Ableman v. Booth*, 21 How. 506, 526 (16:169).

“firm league of friendship” which existed under the articles of confederation, and should be effective and legally and politically competent to the full realization of the hopes of the country, the statesmen and patriots who framed and adopted it deemed it essential (1) that the constitution and valid laws and treaties of the United States, which were to be operative throughout the Union, should be the supreme law of the land, and that no state should be able to defeat their operation within its territorial limits, (2) that the general government should be supreme within the limits of its appropriate sphere of action, and strong enough to execute its own laws, without interference from the states, and (3) that, in order to peacefully maintain that supremacy, it was necessary that the general government should be clothed with judicial power equally paramount in authority to carry into execution the constitution, laws and treaties, and vested with the absolute right of decision in the last resort in all cases of a conflict between state and federal authority; and, accordingly, this great principle was embodied in the constitution, and the supreme court was given final appellate jurisdiction over the courts of the states in all cases arising under the constitution, laws and treaties of the United States. It was, indeed, essential to the very existence of the federal government, as a government, that it should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided.⁵⁵

§ 397. The federal judiciary a peaceful means of removing obstructions to interstate commerce.—Whilst the United States may rightfully use physical force to remove and prevent obstructions to the freedom of interstate commerce and the car-

⁵⁵ *Ableman v. Booth*, 21 How. 506, 526 (16:169); *United States v. Tarble*, 13 Wall. 397, 413 (20:597); *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Martin v. Hunter's Lessees*, 1 Wheat. 304 (4:97); *Dartmouth College v. Woodward*, 4 Wheat. 518 (4:629);

Gibbons v. Ogden, 9 Wheat. 1 (6:23); *McCulloch v. Maryland*, 4 Wheat. 316 (4:579); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Fletcher v. Peck*, 6 Cranch, 87 (3:162); *Federalist*, Nos. LXXX, LXXXI and LXXXII.

riage of the mails, when such obstruction has been created by lawlessness and violence, and may, for that purpose, when the emergency arises, call into action the army, yet the right to use force does not exclude the right of the government in such cases to resort to its own courts for a judicial determination of the questions of right and wrong involved, and for a peaceful enforcement of that determination when made, and also for a prevention, by the extraordinary processes of the court, of a recurrence or continuance of such obstructions; and for such a choice of peaceful means and instrumentalities for the execution of its powers, the government is to be praised rather than blamed.⁵⁶

§ 398. Relation of the federal judiciary to the national peace. Inasmuch as the constitution devolved upon the federal government the powers and correlative duties and responsibilities of national sovereignty, one of the most important of which is the conduct of the relations of this country with foreign nations, and “as the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war,” it inevitably follows “that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned,” such as cases arising under treaty stipulations, suits in admiralty, prize causes, and suits against ambassadors, other public ministers and consuls, and crimes committed on the high seas.⁵⁷

§ 399. Relation of the federal judiciary to domestic tranquility and peace.—The creation of the federal government by the constitution was not merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home—to “insure domestic tranquility;” for if that object could be attained, there would be but little danger from abroad;⁵⁸ and, with that end in view, the supreme court was given original jurisdiction of controversies between two or more states, having in mind, no doubt, the subject of controverted boundaries between different states, which had been,

⁵⁶ *Re Debs*, 158 U. S. 564, 600 (39:1092); *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 290, 374 (41:1007).

⁵⁷ *Federalist*, No. LXXX; *Fair-*

fax v. Hunter, 7 Cranch, 603 (3:453); *Martin v. Hunter’s Lessees*, 1 Wheat. 304 (4:97).

⁵⁸ *Ableman v. Booth*, 21 How. 506, 526 (16:169).

before the adoption of the constitution, and continued some time afterwards, a source of dissension and irritating and angry controversies, threatening at times to end in force and violence, but which were, however, averted by the exercise of the judicial power.⁵⁹

§ 400. Territorial courts not courts of the United States.—The territorial courts are not, within the meaning of the constitution, courts of the United States, although they have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States; but they are legislative courts created in the exercise of the power granted by the clause of the constitution authorizing congress to make all needful rules and regulations respecting the territories belonging to the United States.⁶⁰ Congress is vested with both national and municipal sovereignty in the territories, and exercises therein the powers of both the state and federal governments, and the territorial courts administer two distinct jurisdictions, namely (1) the local laws of the territory, and (2) the laws of the United States within the territory.⁶¹

§ 401. The court of claims a special court.—The court of claims established by the act of February twenty-fourth, eighteen hundred and fifty-five, is a special court for the adjudication of claims against the government, and, while it is a court of great importance, it is not a part of the regular federal judicial system.⁶²

⁵⁹ Rhode Island v. Massachusetts, 12 Pet. 567, 755 (9:1233); Florida v. Georgia, 17 How. 478 (15:181); Missouri v. Iowa, 7 How. 660 (12:861); Alabama v. Georgia, 23 How. 506 (16:556); Missouri v. Kentucky, 11 Wall. 395 (20:116).

⁶⁰ Ins. Co. v. Canter, 1 Pet. 511 (7:242); Clinton v. Englebrecht, 13 Wall. 434, 449 (20:659); Reynolds v. United States, 98 U. S.

145, 168 (25:244); Benner v. Porter, 9 How. 235 (13:119); Thied v. Utah, 159 U. S. 510, 523 (40:237); McAllister v. United States, 141 U. S. 174, 201 (35:693).

⁶¹ Ex parte Kang-Gi-Shun Co., 109 U. S. 556, 572 (27:1030); Ex parte Gon-Shay-Ee, 130 U. S. 343, 353 (32:973).

⁶² U. S. Rev. Stat. secs. 1049–1093; 1 U. S. Comp. Stat. pp. 729–764; 2 Fed. Stat. Anno. 53–100.

CHAPTER VIII.

THE RELATION OF THE FEDERAL JUDICIARY AND THE STATE JUDICIARY TO EACH OTHER.

§ 402. Exclusive jurisdiction of federal courts over particular subjects.

403. Same—Not affected by general statutes defining the concurrent jurisdiction.

§ 404. The three-fold character of federal jurisdiction.

405. The federal courts and state courts for some purposes constitute one judicial system.

§ 402. **Exclusive jurisdiction of federal courts over particular subjects.**—It resulted, inevitably, from the nature of the dual system¹ of government established by the federal constitution, that a large field of jurisdiction should be vested in the federal judiciary, in which the state judiciary could have no participation, as no part of the judicial power of the United States can be vested in the courts of the states;² and it also resulted from the constitution that at the election of congress the federal courts may be given exclusive jurisdiction of cases arising under the laws of the United States, but in the absence of exclusive words the state courts would in a large class of such cases exercise concurrent jurisdiction;³ and, accordingly, federal legislation, commencing with the original judiciary act, has, from time to time, vested in the district and circuit courts a very comprehensive jurisdiction in special cases and over particular subjects, exclusive of the state courts, which is, in some instances, vested exclusively in the district courts, in

¹ *Ableman v. Booth*, 21 How. 506, 526 (16:169); *United States v. Tarble*, 13 Wall. 397, 413 (20:597).

² *Martin v. Hunter's Lessees*, 1 Wheat. 304, 335 (4:97, 105); *Houston v. Moore*, 5 Wheat. 1, 27 (5:19, 25); *Robertson v. Baldwin*, 165 U. S. 275 (41:715); *United States v. Lathrop*, 17 Johns. 4 (6:264); *R. Co. v. Whitton*, 13 Wall. 288

(20:577); *The Moses Taylor*, 4 Wall. 429 (18:401); *Gaines v. Fuentes*, 92 U. S. 10, 26 (23:524).

³ *Stearns v. United States*, 3 Paine, 300, Fed. Cas. 13,341; *Martin v. Hunter's Lessees*, 1 Wheat. 304, 335 (4:97, 105); *R. Co. v. Whitton*, 13 Wall. 288 (20:571); *The Moses Taylor*, 4 Wall. 429 (18:401).

others exclusively in the circuit courts, and still in others the the district and circuit courts have concurrent jurisdiction,⁴ and, under the second section of what is known as the Tucker Act, the district court and the circuit court, each has, in certain specified classes of cases, concurrent jurisdiction with the court of claims, according to the amount involved, but the jurisdiction of the district and circuit court is, as between themselves under that act, exclusive.⁵

§ 403. Same—Not affected by general statutes defining the concurrent jurisdiction of the federal and state courts.—It is a fundamental rule of federal jurisprudence that general statutes passed by congress defining the concurrent jurisdiction of the federal and state courts are not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases, and over particular subjects, nor to alter the distribution of jurisdiction, as between the circuit court and the district court, of cases which, by reason of their subject-matter, have been committed by congress to the exclusive determination of the federal courts, nor to repeal the special provisions of former laws conferring on the circuit and district courts jurisdiction of such cases without regard to the amount in dispute, or the citizenship of the parties; and it has been accordingly held, uniformly, that the provision of the later general judiciary acts conferring upon the circuit courts of the United States “original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority,” does not take away from the circuit or district courts the jurisdiction conferred upon them by prior statutes in special cases and over particular subjects, nor divest the jurisdiction which had for so long a time been vested exclusively in

⁴ 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73-79; U. S. Rev. Stat. art. 711; U. S. Comp. St. 576-578; 24 U. S. Stat. at L. ch. 359, p. 505; 23 U. S. Stat. at L. ch. 164, p. 332; 26 U. S. Stat. at L. ch. 551, p. 1084; 23 U. S. Stat. at L. ch. 149, p. 321; 26 U. S. Stat. at L. ch. 407, sec. 15, p. 138; 26 U. S. Stat. at L. ch. 647, p. 209; 28 U. S. Stat. at L. ch. 349, secs. 73-77, p. 570, and many others.

⁵ 24 U. S. Stat. at L. ch. 359, p. 505.

the district courts, nor in any manner alter the prior distribution of jurisdiction, as between the circuit and district courts in such special cases and over such particular subjects.⁶

§ 404. **The three-fold character of federal jurisdiction.**—The jurisdiction of the federal courts is either (1) original and exclusive of the state courts, or (2) original and concurrent with the state courts, or (3) it is appellate.

1. In all suits arising out of any subject-matter of judicial cognizance, over which the exercise of judicial power is necessary in order to enforce the authority of the federal government, or to specifically execute the powers exclusively vested in it by the constitution, or to collect its revenues and carry on its operations, and in all suits arising out of any subject-matter over which the exercise of judicial power may directly affect the relations of this government with foreign governments, the district courts and circuit courts of the United States are vested with original jurisdiction, exclusive of the courts of the states.⁷

2. In two classes of suits of a civil nature, one class dependent upon the character of the parties, their rights arising out of state laws and jurisprudence, and the other class dependent upon the nature of the suit, the rights of the parties arising out of the constitution, laws and treaties of the United States, the circuit courts of the United States are vested with original jurisdiction concurrent with the courts of the several states.⁸

⁶ *United States v. Mooney*, 11 Fed. R. 476, S. C. 116 U. S. 104, 108 (29:550); *Price, Receiver, v. Abbott*, 17 Fed. R. 506; *Hendee v. R. Co.*, 26 Fed. R. 677; *Stephens v. Bernays*, 41 Fed. R. 401; *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Platt v. Beach*, 2 Ben. 303, Fed. Cas. 11,215; *Stanton v. Wilkeson*, 8 Ben. 357, Fed. Cas. 13,297; *U. S. v. Mexican National Ry. Co.*, 40 Fed. R. 769; *Frelinghuysen v. Baldwin*, 12 Fed. R. 395; *Fisher v. Yoder*, 53 Fed. R. 565; *Thompson v. Pool*, 70 Fed. R. 725; *Short v. Hepburn*, 75 Fed. R. 113; *Brown v. Smith*, 88 Fed. R. 565; *Myers v. Hettinger*, 94 Fed. R. 370; *Aldrich v. Campbell*, 97 Fed. R. 663; *McCartney v. Earl* (C. C. A.) 115

Fed. R. 462; *Stephens v. Bornays*, 44 Fed. R. 642; *Bank v. Harrison*, 3 McCrary, 162, Fed. Cas. —; *United States v. Whitcomb Bedstead Co.*, 45 Fed. R. 90.

⁷ 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73-79; U. S. Rev. Stat. art. 711; U. S. Comp. Stat. 576-578; 24 U. S. Stat. at L. ch. 359, p. 505; 23 U. S. Stat. at L. ch. 164, p. 332; 26 U. S. Stat. at L. ch. 551, p. 1084; 23 U. S. Stat. at L. ch. 149, p. 321; 26 U. S. Stat. at L. ch. 407, sec. 15, p. 138; 26 U. S. Stat. at L. ch. 647, p. 209; 28 U. S. Stat. at L. ch. 349, sec. 73-77, p. 570; 24 U. S. Stat. at L. ch. 359, p. 505.

⁸ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 433.

3. In all cases decided by the district courts and circuit courts, an appeal or writ of error lies from their final decrees and judgments to the United States supreme court, or to the circuit court of appeals, according to the nature of the questions involved,⁹ and in all cases decided by a state court involving a federal question, the final judgment or decree of the highest court of the state in which a decision of the case may be had may be reviewed on writ of error by the United States supreme court.¹⁰

§ 405. **The federal courts and state courts for some purposes constitute one judicial system.**—The circuit courts of the United States, in exercising concurrent jurisdiction with the courts of the states in the class of cases in which their jurisdiction is dependent upon the character of the parties, are, for all practical purposes, courts of the state in which they sit, and their function, under such circumstances, is to enforce the rights of parties according to the laws of the state, taking care, always, as the courts of the states must take care, not to infringe any right secured by the constitution and laws of the United States;¹¹ and the state courts in exercising jurisdiction concurrent with the circuit courts of the United States in cases arising under the constitution, laws and treaties of the United States, become “auxiliaries to the execution of the laws of the Union,” and the support of its authority, and, in this aspect of the dual polity established by the constitution, the state and federal courts reciprocally support the authority of the state and federal governments, and for this purpose the two systems of courts constitute one judicial system.¹²

⁹ 26 U. S. Stat. at L. ch. 517, p. 826.

¹⁰ U. S. R. S. sec. 709; *Murdock v. City of Memphis*, 20 Wall. 590–636; *Dartmouth College v. Woodward*, 4 Wheat. 518 (4:629); *McCulloch v. Maryland*, 4 Wheat. 316 (4:579); *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Gibbons v. Ogden*, 9 Wheat. 1 (6:23); *Martin v. Hunter's Lessees*, 1 Wheat.

304 (4:97); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Ableman v. Booth*, 21 How. 506, 526 (16:169).

¹¹ *Madisonville Traction Co. v. Mining Co.*, 196 U. S. 239–261 (49:462).

¹² *Federalist*, No. LXXXII; *Cohens v. Virginia*, 6 Wheat. 264, 419, 420 (5:257, 294, 295).

CHAPTER IX.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

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| <p>§ 406. Two general classes of cases over which the supreme court is granted original jurisdiction.</p> <p>407. Same—Classification of cases in which a state may be a party.</p> <p>408. Same—Same—No jurisdiction of suit by state against own citizens.</p> <p>409. The original jurisdiction not made exclusive.</p> <p>410. Same—Jurisdiction of the court of claims—United States v. Louisiana.</p> <p>411. Suits between states to settle boundaries.</p> <p>412. Jurisdiction of suits be-</p> | <p>tween states not confined to controversies to settle boundaries.</p> <p>§ 413. Same—Division by one state of flow of water into another.</p> <p>414. In suits between states there must be a justiciable controversy between them as states.</p> <p>415. Suits by the United States against a state.</p> <p>416. The jurisdiction extends to suits of a civil nature only.</p> <p>417. Procedure in the supreme court in cases of original jurisdiction.</p> |
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§ 406. Two general classes of cases over which the supreme court is granted original jurisdiction.—The supreme court of the United States is, by the constitution, vested with original jurisdiction over two general classes of cases, namely: (1) All cases affecting ambassadors, other public ministers and consuls; and (2) cases in which a state shall be a party.¹ It is not within the competency of congress to vest in the supreme court original jurisdiction in any other classes of cases than those specified in the constitution.²

§ 407. Same—Classification of cases in which a state may be a party.—The cases in which a state may be a party, and over which the supreme court is, by the constitution, vested with original jurisdiction, are classified as follows: (1) Controversies between two or more states; (2) controversies between a

¹ U. S. Const. art. III, sec. 2.

137 (2:60); Ex parte Yerger, 8

² Marbury v. Madison, 1 Cranch,

Wall. 96, 97 (19:336).

state and citizens of another state; (3) controversies between a state and foreign states; (4) controversies between a state and citizens or subjects of foreign states, that is, aliens;³ and (5) controversies between the United States and a state.⁴

§ 408. **Same—Same—No jurisdiction of suit by state against own citizens.**—The supreme court has no original jurisdiction of a suit brought by a state against one of its own citizens,⁵ nor of a suit between a state and citizens of another state and its own citizens, and corporations joined as defendants.⁶

§ 409. **The original jurisdiction not made exclusive.**—The original jurisdiction conferred upon the United States supreme court by the federal constitution is not, by that instrument, made exclusive; and it is competent for congress to vest in the inferior courts of the United States original jurisdiction of the same classes of controversies, of which the supreme court is by the constitution given original cognizance.⁷ And congress has, in the exercise of its power, provided that in certain classes of those cases the original jurisdiction shall be exclusive, and in others it shall not be exclusive. The exclusive jurisdiction is: (1) of all controversies of a civil nature where a state is a party, except between a state and citizens of other states or aliens; and (2) of all such suits or proceedings against ambassadors, or other public ministers, or their domestics or servants, as a court of law can take cognizance of, consistently with the laws of nations. The original jurisdiction of the supreme court which is not exclusive is: (1) of suits between a state and citizens of other states or aliens; and (2) of suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party.⁸ It seems, also, that the original jurisdic-

³ U. S. Const. art. III, sec. 2; *Ames v. Kansas*, 111 U. S. 449-472 (28:482); *St. Luke's Hospital v. Barclay*, 3 Blatchf. 265; *Graham v. Stucken*, 4 Blatchf. 50; *California v. Southern Pac. Co.*, 229-271 (39:683); *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. 553 (19:998).

⁴ *United States v. Texas*, 143 U. S. 621 (36:285); *United States v. North Carolina*, 136 U. S. 221-222 (34:336).

⁵ *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. 553 (19:998).

⁶ *California v. Southern Pac. Co.*, 157 U. S. 229-271 (39:683); *Minnesota v. Northern Securities Co.*, 184 U. S. 199-247 (46:499).

⁷ *Ames v. Kansas*, 111 U. S. 449-472 (28:482); *Gittings v. Crawford*, 1 Taney, Dec. 1; *United States v. Louisiana*, 123 U. S. 32-39 (31:69); *Bors v. Preston*, 111 U. S. 252-263 (28:419).

⁸ U. S. Rev. Stat. sec. 687; 4 Fed. Stat. Anno. 436.

tion of a suit by a state against the United States is not exclusive in the supreme court.⁹

§ 410. **Same—Jurisdiction of the court of claims—United States v. Louisiana.**—The United States having by statute consented to be sued in the court of claims, upon any claim founded upon a law of congress, and being indebted to the state of Louisiana in an aggregate sum of \$71,385.83, arising under two certain acts of congress, and the federal constitution not making the original jurisdiction of the supreme court exclusive in cases where a state is a party, and the federal statute whereby the United States consents to be sued, as aforesaid, making no exception when a state is a party, there is no more reason why the jurisdiction of the court of claims should not be exercised in such a case, than when a private person is a suitor. The statute by which the government consents to be sued making no exception as to the jurisdiction of the court of claims in such cases, the supreme court can create no such exception. The jurisdiction of the court of claims was sustained.¹⁰

§ 411. **Suits between states to settle boundaries.**—The most numerous class of cases of which the supreme court has entertained original jurisdiction is that of controversies between two states as to the boundaries of their territory, such as were determined before the revolution by the king in council, and, under the Articles of Confederation, while there was no national judiciary, by committees or commissioners appointed by congress. All such suits have been entertained on the equity side of the court, as suits in chancery, and the usual prayer of the bill is that the court, by its decree, may ascertain and establish the boundary line between the states, parties plaintiff and defendant, and that the plaintiff be restored to her right of jurisdiction and sovereignty over the disputed territory, and that she be quieted in her title, possession and enjoyment of such territory.¹¹

⁹ United States v. Louisiana, 123 U. S. 32-39 (31:69).

¹⁰ United States v. Louisiana, 123 U. S. 33-39 (31:69). And see, also, South Carolina v. United States, 199 U. S. 437-472 (50:261).

¹¹ New Jersey v. New York, 3

Pet. 461 (7:741); S. C. 5 Pet. 284 (8:127); S. C. 6 Pet. 323 (8:414); Rhode Island v. Massachusetts, 12 Pet. 657-762 (9:1233-1275); S. C. 13 Pet. 23 (10:41); S. C. 14 Pet. 210 (10:423); S. C. 15 Pet. 233 (10:71); S. C. 4 How. 591 (11:

§ 412. **Jurisdiction of suits between states not confined to controversies concerning boundaries.**—Although the history of litigation in the supreme court shows that its original jurisdiction has been more frequently invoked and exercised in suits between states involving boundaries, and questions of jurisdiction and sovereignty over lands and people, directly affecting the property rights and interests of a state, yet manifestly such cases do not cover the entire field in which controversies may arise between states over which the supreme court is, by the constitution, vested with original jurisdiction, and that court has declared that it would be objectionable, and, indeed, impossible, for it to anticipate by definition what controversies between states can and what cannot be brought within its original jurisdiction; and a bill filed by one state to enjoin another and a corporation created by it from discharging sewage into the public waters of the plaintiff state, whereby such waters and the soil under them would become polluted, and contagious and typhoidal diseases would be introduced into the river communities, spreading themselves throughout the state, and threatening the impairment of the comfort, health and prosperity of the towns along such public waters, including its commercial metropolis, stated a case affecting the entire state, and of which the court had original jurisdiction under the constitution.¹² It is also held that the court has jurisdiction of a bill filed by one state against another to compel the payment of bonds lawfully issued by defendant state, and to foreclose a mortgage given on certain railroad stock to secure the debt, the plaintiff state being the owner of the bonds.¹³

§ 413. **Same—Diversion by one state of flow of water into another.**—A bill in equity, which, by the averment of facts, presents the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river

1116); *Missouri v. Iowa*, 7 How. 660 (12:861); *S. C.* 10 How. 1 (13:303); *Florida v. Georgia*, 17 How. 478 (15:181); *Alabama v. Georgia*, 23 How. 505 (16:556); *Virginia v. West Virginia*, 11 Wall. 39 (20:67); *Missouri v. Kentucky*, 11 Wall. 395 (20:116); *Louisiana v. Mississippi*, 202 U. S. 1-59 (50:

913); *Iowa v. Illinois*, 202 U. S. 59, 60 (50:934); *Nebraska v. Iowa*, 143 U. S. 359-370 (36:186).

¹² *Missouri v. Illinois*, 180 U. S. 208-250 (45:497); *S. C.* 200 U. S. 496-526 (50:572).

¹³ *South Dakota v. South Carolina*, 192 U. S. 286-354 (48:448).

rising in the former, and, by nature, flowing into and through the latter, and which seeks a decree enjoining such diversion, presents a controversy between two states within the original jurisdiction of the supreme court.¹⁴

§ 414. In suits between states there must be a justiciable controversy between them as states.—In a suit between states, in order to maintain the jurisdiction, there must exist a real justiciable controversy, in which the entire state, plaintiff and defendant, each respectively, is directly and immediately interested. The rights and interests represented by the plaintiff must belong to it in its capacity as a state; and the action of the defendant complained of must be state action. A bill in equity brought by one state against another and its state officers must show by proper averments, made in conformity to the established rules of equity pleading, that the controversy presented for decision and determination is a controversy directly between the plaintiff state and the defendant state, and not a controversy in which the plaintiff state seeks the redress of the grievances of particular individual citizens of plaintiff state. There must be a direct issue between the states; and that issue must, by reason of the subject-matter out of which it arises, be susceptible of judicial solution. And one state cannot maintain a bill in equity to enjoin the execution of the quarantine laws of the defendant state, upon the ground that in the execution of them the officers charged therewith, by rules and regulations formed and put in force thereunder by them, unnecessarily and unreasonably interdict, absolutely and intentionally, interstate commerce between plaintiff and defendant states, and that the governor of the latter permits those rules and regulations to stand and be enforced, although he has the power to modify them, and that such maladministration of its quarantine laws injuriously affects the interests of the citizens of plaintiff state, and is a violation of the constitutional provision giving congress the power to regulate interstate commerce. Neither the regulation of interstate commerce, nor the vindication of the freedom of that commerce is committed to any state; and no state is engaged or can engage in interstate commerce; and the absolute and intentional interdiction of commerce between two states by means of unnecessary and unreasonable quaran-

¹⁴ *Kansas v. Colorado*, 185 U. S. 125–147 (46:838); *S. C.* 206 U. S. 46–48 (51:956).

tine regulations established and enforced by one of them, does not give a cause of action to the other, although such quarantine rules and regulations are more stringent than called for by the particular exigency, and have been purposely framed with the view of benefiting the commerce and commercial cities maintaining them, at the expense of the complaining state and its commercial cities.¹⁵

§ 415. **Suits by the United States against a state.**—Under the constitutional grant to the supreme court of original jurisdiction in cases in which a state shall be a party, that court has jurisdiction of a suit filed therein by the United States against one of the states of the Union, to determine the boundary between such state and one of the territories of the United States. A question of boundary between a territory of the United States and one of the states of the Union is not one of a political nature, but is one susceptible of judicial determination by a court having jurisdiction of such a controversy; and that jurisdiction is vested, by the constitution, in the supreme court.¹⁶ An action of debt may be brought and determined upon its merits in the supreme court, by the United States against one of the states of the Union.¹⁷

§ 416. **The jurisdiction extends to suits of a civil nature only.** The mere fact that a state is plaintiff is not a conclusive test that the controversy presented is within the original jurisdiction of the supreme court, and in which that court can grant relief against another state or her citizens or corporations created by her. It is only suits of a civil nature which are within this jurisdiction, and it does not extend to a suit by a state to recover of the citizens or corporations of another state penalties for a breach of her own municipal laws. The courts of no country or sovereignty execute the penal laws of another; and this rule applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties and forfeitures for any violation of statutes for the protection of its revenues, or other municipal laws, and to all judgments for such

¹⁵ *Louisiana v. Texas*, 176 U. S. 1-28 (44:347).

¹⁶ *United States v. Texas*, 143 U. S. 621-649 (36:285).

¹⁷ *United States v. North Carolina*, 136 U. S. 211 (34:336).

penalties. And it has been accordingly held that the supreme court has no original jurisdiction of an action of debt brought by a state against an insurance corporation created by another state upon a judgment recovered by the plaintiff state against the defendant corporation for a penalty imposed by its statutes upon an insurance company for doing business in that state without having deposited in the office of the state commissioner of insurance the annual statement of its business and property as required by such statute.¹⁸ It is well settled that the court has no jurisdiction of a suit brought by a state, the subject-matter of which is political.¹⁹

§ 417. Procedure in the supreme court in cases of original jurisdiction.—The distinction between legal and equitable remedies is recognized in all the courts of the United States;²⁰ and in cases of original jurisdiction in the supreme court, it will frame its proceedings according to those which, at the time of the Revolution, had been adopted in England in analogous cases, the rules of the court of king's bench being followed in actions at law, and the rules of the court of Chancery governing in suits in equity, although the court is not bound to follow that procedure when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice.²¹

¹⁸ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265-300 (32:239); U. S. Rev. Stat. sec. 687; 4 Fed. Stat. Anno. 436.

¹⁹ *Georgia v. Stanton*, 6 Wall. 50-78 (18:721).

²⁰ *White v. Berry*, 171 U. S. 366-378 (43:199).

²¹ *California v. Southern Pacific*

Co., 157 U. S. 229-271 (39:683); *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233); S. C. 13 Pet. 23 (10:41); 14 Pet. 210 (10:423); { 15 Pet. 233 (10:721); *Georgia v. Grant*, 6 Wall. 241 (18:848); *Florida v. Georgia*, 17 How. 478 (15:181).

CHAPTER X.

THE FEDERAL APPELLATE JURISDICTION.

(a) THE APPELLATE JURISDICTION OF THE FEDERAL SUPREME COURT OVER STATE COURTS.

§ 418. The appellate jurisdiction of the federal supreme court over state courts derived from the constitution.

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422. Same—Writ of error defined by the common law.

423. Same—Same—A writ of error is not the commencement of a suit but the continuation of one previously brought.

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445. Form and requisites of the writ of error.
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449. Supersedeas upon writ of error—A statutory remedy.
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451. Service of citation in error — Upon attorney and counsel of record.
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- (b) APPELLATE JURISDICTION OVER THE INFERIOR FEDERAL COURTS.
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461. Same—Two years allowed in which to take appeals and writs of error.
462. Same—Writs of error on behalf of the United States in criminal cases where there has been no jeopardy or verdict in favor of defendant.
463. Appellate jurisdiction of the supreme court over the circuit courts of appeals.
464. Appellate jurisdiction of the supreme court over the court of claims.
465. Same—Time and manner of taking.
466. Appellate jurisdiction of the United States circuit courts of appeals.
- 466a. Same—Time allowed for taking writ of error on appeal.

(a) THE APPELLATE JURISDICTION OF THE FEDERAL SUPREME COURT OVER STATE COURTS.

§ 418. The appellate jurisdiction of the federal supreme court over state courts derived from the constitution.—The words of the federal constitution defining the judicial power of the

general government grants to the federal supreme court appellate jurisdiction in all cases arising under the constitution, laws and treaties of the United States, in whatever court, state or federal, those cases may originate and be decided, and whoever may be parties to them, and even though a state may be party, and it is immaterial whether the case be one of a civil or a criminal nature; and from this constitutional grant of appellate judicial power is derived the jurisdiction of the supreme court to re-examine and revise, upon writ of error, the final judgments and decrees of the highest courts of the states involving a federal question, when that question is decided adversely to the federal right claimed in the manner prescribed by the federal statute. This appellate jurisdiction is granted directly, and not mediately, by the constitution to the supreme court.¹

§ 419. Same—Power of congress to regulate the exercise of the appellate jurisdiction of the supreme court.—While it is true that the appellate jurisdiction of the federal supreme court over the courts of the states in cases arising under the constitution, laws and treaties of the United States, was derived directly and not mediately from the fundamental law, yet it is also true that that instrument vested in congress the power to regulate the exercise of that appellate jurisdiction. The second clause of the second section of the third article of the constitution, after distributing to the supreme court original jurisdiction in two classes of cases, provides that: “In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make;” and, in the exercise of this power, congress has, beginning with the twenty-fifth section of the original judiciary act, by statute more fully and clearly defined this appellate jurisdiction, and established regulations for its exercise, which by amendments and judicial construction, have been matured and crystalized into a well-defined system;² and a writ of error

¹ U. S. const. art III. secs. 1, 2; *Cohens v. Virginia*, 6 Wheat. 264–448 (5:257); *Martin v. Hunter’s Lessees*, 1 Wheat. 304–382 (4:97); *Ableman v. Booth*, 21 How. 506–526 (16:169); *Twitchell v. Common-*

wealth, 7 Wall. 321–327 (19:223); *Ward v. Maryland*, 12 Wall. 418–433 (20:449).

² 1 U. S. Stat. at L. ch. 20, sec. 25, pp. 73–79; 14 U. S. Stat. at L. ch. 28, sec. 2 p. 386; 18 U. S. Stat. at

from the supreme court to revise a judgment or decree of a state court can only be maintained when within the purview of the regulations established by federal legislation on the subject.³

§ 420. Text of the federal statutes regulating the exercise of the appellate jurisdiction of the supreme court over the state courts.—The legislation of congress, enacted pursuant to the power vested in it by the constitution, for the regulation of the appellate power of the supreme court over the courts of the state, has been consolidated in sections seven hundred and nine, nine hundred and ninety-nine and one thousand and three of the United States revised statutes,⁴ the full text of each of which is here given in the order named:

(1) “A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had

L. ch. 8 p. 318; U. S. Rev. Stat. secs. 709, 999, 1003; 4 Fed. Stat. Anno. 467, 468, 610, 616; U. S. Comp. Stat. pp. 575, 712; *Murdock v. Memphis*, 20 Wall. 590-642 (22:429); *Columbia Water Power Co. v. Columbia Electric Street Ry. Light & Power Co.*, 172 U. S. 475-493 (43:521); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291-313 (47:480).

³ *Capital National Bank v. First*

National Bank, 172 U. S. 425-434 (43:502); *Hurley v. Street*, 14 Wall. 85-87 (20:786); *Caperton v. Ballard*, 14 Wall. 238-243 (20:885); *Armstrong v. Treasurer*, 16 Pet. 281-290 (10:965); *Crowell v. Randall*, 10 Pet. 368-399 (9:458); U. S. Rev. Stat. sec. 709.

⁴ *Murdock v. Memphis*, 20 Wall. 590-642 (22:429); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291-313 (47:480).

been rendered or passed in a court of the United States; the supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ.”⁵

(2) “When the writ is issued by the supreme court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the supreme court, and the adverse party shall have at least thirty days’ notice; and when it is issued by the supreme court to a state court, the citation shall be signed by the chief justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days’ notice.”⁶

(3) “Writs or error from the supreme court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.”⁷

§ 421. Judgment of state court reviewed by supreme court upon writ or error only.—Although the constitution declares that the supreme court shall have appellate jurisdiction, “both as to law and fact,” in cases arising under the constitution, laws and treaties of the United States, and this jurisdiction extends to such suits decided in the state courts, yet the only method or procedure which has ever been provided by congress for the exercise of this appellate jurisdiction to re-examine and revise the judgments and decrees, at law and in equity, of the highest courts of the state is “upon writ of error” only, and not upon appeal, which removes nothing for re-examination by the appellate court but the law of the case.⁸

⁵ U. S. Rev. Stat. 709; 4 Fed. Stat. Anno. 467-468; U. S. Comp. Stat. 1901, p. 575.

⁶ U. S. Rev. Stat. 999; 4 Fed. Stat. Anno. 610; U. S. Comp. Stat. 1901, p. 712.

⁷ U. S. Rev. Stat. sec. 1003; 4 Fed. Stat. Anno. 616; U. S. Comp. Stat. 1901, p. 713.

⁸ *Dower v. Richards*, 151 U. S. 658-673 (38:305); *Cohens v. Virginia*, 6 Wheat. 264-448 (5:257); *Verden v. Coleman*, 22 How. 192 (16:336); *Egan v. Hart*, 165 U. S. 180 (41:680); *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226-263 (41:979); *Bartlett v. Lockwood*, 160 U. S. 368 (40:

The distinction between an appeal and a writ of error is, that the former is a process of civil-law origin, and removes a cause entirely, subjecting the facts as well as the law to a review and retrial; while the latter is a process of common-law origin, and removes nothing for re-examination but the law.⁹ This system of review of the judgments of the state courts was adopted in the original judiciary act and has been adhered to ever since,¹⁰ and the provision contained in the seventh amendment of the constitution of the United States, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," applies to cases tried originally in the courts of the states, and since its adoption it is not within the competency of congress to allow appeals from state courts of the several states to the supreme court of the United States in suits at common law.¹¹

§ 422. Same—Writ of error defined by the common law.—A writ of error is defined by the English common law to be an original writ, issuing out of the court of chancery, in the nature (1) of a *certiorari* to remove a record upon which a judgment has been given from an inferior court of law of record into a superior court, and (2) also in the nature of a commission to the judges of the superior court to examine the record upon which the judgment was given, and, on such examination, to affirm or reverse the judgment according to law; and

460); *Stanley v. Schwalby*, 162 U. S. 278 (40:968); 1 U. S. Stat. at L. ch. 20, sec. 25, pp. 73-79; 14 U. S. Stat. at L. ch. 28, sec. 2, p. 386; 18 U. S. Stat. at L. ch. 8, p. 318; U. S. Rev. Stat. sec. 709; *Clipper Min. Co. v. Ell. Min. Co.*, 194 U. S. 220-235 (48:944); *Adams v. Church*, 193 U. S. 510-517 (48:769); *Thayer v. Spratt*, 189 U. S. 346-354 (47:845); *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U. S. 92-104 (45:765); *Hedrick v. Atchison, Topeka & Santa Fee Railroad Co.*, 167 U. S. 673-681 (42:320); *Atchison, Topeka &*

Santa Fe Railroad Co. v. Matthews, 174 U. S. 96-125 (43:909).

⁹ *Wiscart v. Dauchy*, 3 Dall. 321 (1:619); *Dower v. Richards*, 151 U. S. 658-673 (38:305); *United States v. Goodwin*, 7 Cranch, 108-112 (3:284); *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226-263 (41:979).

¹⁰ 1 U. S. Stat. at L. ch. 20, sec. 25, pp. 73-79; 14 U. S. Stat. at L. ch. 28, sec. 2, p. 386; U. S. Rev. Stat. sec. 709.

¹¹ *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226-263 (41:979); *Parsons v. Bedford*, 3 Pet. 433-458 (7:732).

the writ lay where a party conceived or alleged himself to be aggrieved by an error in the foundation, proceedings, judgment, or execution, of a suit in a court of law of record. The writ of error consisted of two parts, namely: (1) a *certiorari* to remove the record; and (2) a commission to the judges of the superior court to examine it and affirm or reverse the judgment according to law. Upon the principle that the writ was in the nature of a *certiorari*, it was effectual to remove the record, if rightly described, although irregularly sued out, and the record remained in the superior court, after the writ was quashed for such irregularity; and upon the principle that it was in the nature of a commission to the judges of the superior court, the writ was not amendable at common law, because no court was ever allowed to amend its own commission. The writ was, by the rules of the common law, grantable in all cases *ex debito justitiæ*, except in treason and felony, in which classes of cases it was necessary to obtain the consent of the king before the writ could issue. No writ of error could be issued until after judgment had been given, and it was requisite that it should be a judgment upon the whole record; and, when issued after such judgment, the writ was, by the rules of the common law, a *supersedeas* by implication. But, if the writ bore *teste* of a date prior to the judgment, it was no *supersedeas* and would be quashed. The writ lay only for errors of law apparent upon the face of the record, which were not aided or cured at common law, or by some of the statutes of jeofails; and upon a writ of error, there could be no re-examination of facts, but the judges of the superior court, in their examination of the record, were confined to substantial errors of law upon the face thereof; the extent of their jurisdiction was to examine points of law only, and only those duly presented by the record, and to affirm or reverse the judgment according to law, and in case of reversal to award a *venire de novo*. The errors of law examined were those which appeared upon the face of the record proper, or which were made of record by bill of exceptions.¹²

¹² Co. Litt. 288b; 2 Bac. Abr. 187; 2 Inst. 4; Queen v. Paty, 2 Salk. 504; 2 Chit. Prac. (1st Am. Ed.) 308, 570, 571, 597; 2 Saunderson's report, page 100, extended note

collecting authorities; 2 Tidd's Practice (1807) 784-791, 1051-1066; Lynes v. The State, 5 Porter (Ala.) 236, S. C. 30, Am. Dec. 557-561; Cohens v. Virginia, 6 Wheat.

§ 423. Same—Same—A writ of error is not the commencement of a suit but the continuation of one previously brought.—The issuance and prosecution of a writ of error are not the commencement and prosecution of a new suit, but are the continuation of a suit previously brought in an inferior court, the writ being employed as the legal process to carry it into a supervising court; and, under the federal judiciary act, in consonance with the principles of the common law, the effect of the writ is simply to bring the record into the supreme court and submit the judgment of the state court to re-examination, for the sole purpose of inquiring and determining whether the judgment violates the constitution or laws of the United States. The writ of error rather than an appeal was authorized by the judiciary act as the proceeding by which the supreme court should review the judgment of the state courts in suits involving federal questions, because it is the more usual mode of removing suits at common law from an inferior court into a superior court for review; and, also, because it is more technically appropriate where a single point of law, and not the whole case, is to be re-examined. The writ of error is not directed to, nor does it in any manner act upon the parties; it is directed to the court having custody of the record, and acts only upon the court and upon the record. The writ of error is, therefore, properly directed to the court which holds the proceedings as part of its own records and exercises judicial power over them. The citation is, however, directed to and served upon the defendant in error, simply as a notice to him that the record has been transferred into another court for re-examination upon questions of law, where he may appear or decline to, as his judgment or inclination may determine. But the citation, with its service, while essential to the prosecution of the writ of error after the record is returned, is not a suit, nor has it the effect of original process; for, if the defendant in error does not choose to appear, no default can be entered against him, and the judgment of the state court is to be re-examined, and reversed or affirmed in like manner as if he had appeared and argued his case.¹³

264-448 (5:257); *Cotter v. Ala. G. S. Co.*, 10 C. C. A. 35, 36; *Kitchen v. Randolph*, 93 U. S. 86-92 (23:810).

¹³ *Cohens v. Virginia*, 6 Wheat. 264-448 (5:257); *Atherton v. Fowler*, 91 U. S. 143-149 (23:265); *Kit-*

§ 424. **No re-examination of facts upon writ of error from supreme court to state court.**—The judiciary act, in incorporating in the federal system of judicial remedies the common-law writ of error as a procedure for the exercise of appellate judicial power, thereby adopted the common-law incidents of that writ, including the rule that it removes from the inferior to the superior court for review questions of law only;¹⁴ and, therefore, upon a writ of error from the supreme court to a state court, it is the settled rule that the supreme court cannot re-examine the evidence, and has no jurisdiction to review the conclusions of fact found by the state court, and this rule applies to suits in equity as well as to actions at common law.¹⁵

§ 425. **Classification of cases in which the supreme court has jurisdiction to review the final judgments and decrees of state courts.**—There are, under the federal judiciary act,¹⁶ three classes of cases¹⁷ in which the supreme court has jurisdiction to review, upon writ of error, the final judgments and decrees of state courts, namely:

(1) Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity.¹⁸

chen v. Randolph, 93 U. S. 86-92 (23:810); Nations v. Johnson, 24 How. 195-207 (16:628).

¹⁴ Generes v. Campbell, 11 Wall. 193 (20:110); Payne v. Niles, 20 How. 219 (15:895); United States v. Dashiell, 3 Wall. 618 (18:268).

¹⁵ Dower v. Richards, 151 U. S. 658-673 (38:305); Cohens v. Virginia, 6 Wheat. 264 (5:257); Verden v. Coleman, 22 How. 192 (16:336); Egan v. Hart, 164 U. S. 180 (41:680); Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U. S. 226-263 (41:979); Bartlett v. Lockwood, 160 U. S. 368 (40:460); Stanley v. Schwalby, 162 U. S. 278 (40:968); Clipper Min. Co. v. Eli Min. Co., 194 U. S. 220-235 (48:944); Adams v. Church, 193 U. S. 510-517 (48:767); Thayer v. Spratt, 189 U. S. 346-354 (47:

845); Western Union Telegraph Co. v. Call Pub. Co., 181 U. S. 92-104 (45:763); Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U. S. 96-125 (43:907); Hedrick v. Atchison, Topeka & Santa Fe Railroad Co., 167 U. S. 673, 681 (42:320).

¹⁶ U. S. Rev. Stat. sec. 709.

¹⁷ Columbia Water Power Co. v. Columbia Electric Street Ry., Light & Power Co., 172 U. S. 475-493 (43:521); Mutual Life Ins. Co. v. McGrew, 188 U. S. 291-313 (47:480).

¹⁸ Miller v. Cornwall Railroad Co., 168 U. S. 131-135 (42:409); Baltimore & Potomac R. Co. v. Hopkins, 130 U. S. 210-226 (32:908); Stanley v. Schwalby, 162 U. S. 255-283 (40:960).

(2) Where is drawn in question the validity of a statute of, or authority exercised under, any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity.¹⁹

(3) Or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such constitution, statute, commission or authority.²⁰

§ 426. The jurisdiction of the supreme court must appear from the face of the record.—The jurisdiction of the supreme court of the United States to re-examine, upon writ of error, the final judgment or decree of a state court, cannot arise by mere inference, but must appear by positive and direct averment, or by clear and necessary intendment, from the face of the transcript of the record of the state court annexed to and returned with the writ of error. It must appear upon the face of that record that some one of the federal questions mentioned in section seven hundred and nine of the revised statutes was raised by the plaintiff in error in the state court and decided there against him, before the supreme court can take jurisdiction of the cause. A definite issue as to the validity of a treaty, or statute of, or authority exercised under the United States, or as to the validity of a statute of, or authority exercised under, a state, or as to the possession of some title, right, privilege or immunity under the constitution, or a treaty or

¹⁹ *Schollenberger v. Pennsylvania*, 171 U. S. 1-30 (43:49); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Leisy v. Hardin*, 135 U. S. 100 (34:128); *Columbia Water Power Co. v. Columbia Electric Street Ry., Light & Power Co.*, 172 U. S. 475-493 (43:521); *Gibbons v. Ogden*, 9 Wheat. 1-240 (6:23); *McCulloch v. Maryland*, 4 Wheat. 316-437 (4:579); *Dartmouth College v. Woodward*, 4 Wheat. 518-714 (4:629); *McCulloch v. Virginia*, 172 U. S. 102-133 (43:382); *Miller v. Cornwall Railroad Co.*, 168 U. S.

131-135 (42:409); *Baltimore & Potomac Railroad Co. v. Hopkins*, 130 U. S. 210-226 (32:908).

²⁰ *Oxley Stave Co. v. Butler County*, 166 U. S. 648-660 (41:1149); *Maxwell v. Newbold*, 18 How. 511 (15:506); *Crowell v. Randell*, 10 Pet. 368 (9:458); *Hoyt v. Thompson*, 1 Black, 578 (17:65); *Miller v. Texas*, 153 U. S. 535 (38:812); *Morrison v. Watson*, 154 U. S. 111 (38:927); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291-313 (47:480).

statute of, or commission held or authority exercised under the United States, must be distinctly deducible from the record before the state court can be held to have disposed of a federal question by its judgment. And the determination of the existence of the jurisdiction devolves upon the court itself, and that it must do from the face of the record.²¹

§ 427. When the federal question should be raised.—When should the federal question be raised, in order to give the federal supreme court jurisdiction to re-examine the final judgment of the state court? The answer to this question depends, in every case, very largely upon the procedure of the state in which the case originates, and from whose courts it is removed to the supreme court. The language of the judiciary act is “that a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had,” when the requisite federal question is involved, “may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error.” Each state establishes its own judicial system, with its own forms of procedure. These differ materially in different states, not only as to the jurisdiction of their courts, original and appellate, but also as to the time and manner of raising and presenting questions of law, state or federal, in the progress of a case, and whether the judgments of the courts of original jurisdiction will be revised upon questions raised and presented for the first time in the appellate courts, or whether the revising court is confined to questions raised in the trial court, and, if new questions may be presented in the appellate court, when and in what manner they should be raised and presented. It was not intended that the exercise of the appellate jurisdiction of the federal supreme court should interfere with the set-

²¹ *Powell v. Supervisors of Brunswick County*, 150 U. S. 433-442 (37:1134); *Oxley Stave Co. v. Butler County*, 166 U. S. 648-660 (41:1149); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291-313 (47:480); *Sayward v. Denny*, 158 U. S. 180-186 (39:941); *Murdock v. Memphis*, 20 Wall. 590-642 (22:429); *Gross v. United States Mort-*

gage Co., 108 U. S. 477-490 (27:795); *Leiper v. State of Texas*, 139 U. S. 462-468 (35:225); *Ex parte Spies*, 123 U. S. 131-182 (31:80); *Columbia Water Power Co. v. Columbia Electric Street Ry., Light & Power Co.*, 172 U. S. 475-493 (43:521); *Michigan Sugar Co. v. Dix*, 185 U. S. 112-114 (46:829).

tled judicial procedure of the state courts; but to take the case after the state courts have discharged their duty in relation to it, and if, upon the record as there made, a federal question appears, to affirm or reverse the judgment according to law. It is, therefore, established as a fundamental principle, that the federal supreme court, in deciding whether the federal question was seasonably and properly raised, will give due consideration and full effect to the settled judicial procedure of the state from which the case comes, in so far as it may be done consistently with the limitations placed upon its own jurisdiction.²² In consonance with this principle, the decisions have established the following rule upon the subject, namely:—The proper time to raise the federal question is in the trial court and before its judgment is made final, if that be required by the state procedure, and in accordance with which the appellate courts of the state will not revise the judgment of the trial court upon questions not therein raised;²³ but if, according to the state procedure, the judgment of the trial court will be revised by the state appellate court upon questions raised for the first time in such appellate court, then the federal question may be raised in the state appellate court at any time before its decision and judgment are made final, even upon a petition for a rehearing, if the court will entertain the petition, grant the rehearing, and consider and decide the federal question presented therein, and cause its action in the premises to affirmatively appear from its record and proceedings.²⁴

²² *Crossley v. New Orleans*, 108 U. S. 105 (27:667); *Gross v. United States Mortgage Co.*, 108 U. S. 477 (27:795); *R. R. Co. v. Marshall*, 12 How. 165; *Cousin v. Labatut*, 19 How. 202 (15:601); *Murdock v. Memphis*, 20 Wall. 590-642 (22:429).

²³ *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291-313 (47:480); *Morrison v. Watson*, 154 U. S. 111-115 (38:927); *Ex parte Spies*, 123 U. S. 131-180 (31:80); *Miller v. Texas*, 153 U. S. 535-539 (38:812); *Jacobi v. Alabama*, 187 U. S. 133-136 (47:106); *Layton v. Missouri*,

187 U. S. 356-361 (47:214); *Erie Railroad v. Purdy*, 185 U. S. 148-154 (46:847); *Chicago, Indianapolis & Louisville Ry. Co. v. McGuire*, 196 U. S. 128-133 (49:413); *McMullen v. Ferrum Min. Co.*, 197 U. S. 343-348 (49:784); *French v. Fuller*, 199 U. S. 274.

²⁴ *Mallett v. North Carolina*, 181 U. S. 589-601 (45:1015); *Sweringen v. St. Louis*, 185 U. S. 38-47 (46:795); *Pim v. St. Louis*, 165 U. S. 273-274 (41:714); *Leigh v. Green*, 193 U. S. 79-93 (48:623); *Fullerton v. Texas*, 196 U. S. 192-194 (49:443).

§ 428. **Same—Discretion of state court as to when federal question may be raised.**—If, by the local procedure, a federal question may be presented in the supreme court of the state upon a petition for a rehearing, but the court has plenary discretion as to allowing such question to be raised at such time and in such manner, and actually exercises that discretion and refuses to entertain and decide it, the supreme court cannot take jurisdiction in such a case.²⁵ But a state court cannot, under the pretext of enforcing its local procedure, unreasonably and arbitrarily prevent a party from claiming a federal right, when that claim is seasonably made.²⁶

§ 429. **The federal question must be raised and presented in the proper way.**—The language of the authorities is, that the federal question must be raised and presented, not only at the proper time, but in the proper way. What is the proper way, manner, method or procedure to raise and present the question? There is no rule applicable to all cases; but the way or method is as varied as the incidents of judicial procedure in the progress of a cause from its commencement to final decree. In the light of the adjudicated cases, it may be affirmed that, in order to give the federal supreme court jurisdiction, upon writ of error, to re-examine the final judgment or decree of a state court, the federal question must be raised and presented by some allegation, issue, claim, contention, offer, tender, request, prayer, objection, exception, or other legal proceeding in the progress of the suit, duly made and entered of record in accordance with the requirements of the judicial procedure of the state where the suit arises;²⁷ and the word “record,” in this connection, is not to be given the restricted meaning which

²⁵ Fullerton v. Texas, 196 U. S. 192-194 (49:443); Western Electric Supply Co. v. Abbeville Electric Light & Power Co., 197 U. S. 299-303 (49:765).

²⁶ Rogers v. Alabama, 192 U. S. 223-231 (48:419).

²⁷ Mutual Life Ins. Co. v. McGrew, 188 U. S. 291-313 (47:480); Gibbons v. Ogden, 9 Wheat. 1-240 (6:23); Dartmouth College v. Woodward, 4 Wheat. 518-714 (4:629); McCulloch v. Maryland, 4

Wheat. 316-437 (4:579); Cohens v. Virginia, 6 Wheat. 264-448 (5:257); Brown v. Maryland, 12 Wheat. 419 (6:678); Fairfax v. Hunter, 7 Cranch. 603-632 (3:453); San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177-185 (47:765); Manley v. Park, 187 U. S. 547 (47:296); St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203 (46:872); Yazoo & Mississippi Valley Railroad Co. v. Adams, 180 U. S. 1-25 (45:395); Parmalee v.

it had at common law, but is to be construed liberally, and in the light of the state system of procedure, and the means and methods afforded by it to litigants for the raising and presentation of issues of law and fact and their preservation upon the record.²⁸

A federal question may be raised and presented by the issue joined upon a bill and answer in chancery;²⁹ by an "agreed case;"³⁰ by a special verdict;³¹ by a demurrer to an indictment and judgment thereon against the defendant;³² by request or prayer for an instruction to the jury;³³ by motion to set aside a judgment;³⁴ by motion in arrest of judgment;³⁵ by motion to set aside the verdict of the jury and grant a new trial;³⁶ by motion to set aside a judgment rendered against the plaintiff on a demurrer to his declaration, although the question was not so set up in the declaration as to be decided in passing on the demurrer;³⁷ by motion for new trial in the trial court, followed by assignments of error in the state supreme court;³⁸ by motion to quash an indictment upon the ground of constitutional invalidity in the selection and organization of the grand jury which found and returned it, when the defendant has had no opportunity to challenge the grand array;³⁹ by motion to quash the panel upon the ground of constitutional in-

Lawrence, 11 Wall. 36-39 (20:48); Sweringen v. St. Louis, 185 U. S. 38-47 (46:795).

²⁸ Murdock v. Memphis, 20 Wall. 590-642 (22:429); Armstrong v. Treasurer of Athens County, 16 Pet. 281-290 (10:965); Crescent City Live Stock Landing and Slaughter House Company v. Butchers Union, 120 U. S. 141-160 (30:614); Moore v. Mississippi, 21 Wall. 636-640 (22:653).

²⁹ Gibbons v. Ogden, 9 Wheat. 1-240 (6:23); Murdock v. Memphis, 20 Wall. 590-642 (22:429).

³⁰ Fairfax v. Hunter, 7 Cranch. 603-632 (3:453); Cohens v. Virginia, 6 Wheat. 264-448 (5:252); McCulloch v. Maryland, 4 Wheat. 316-473 (4:579).

³¹ Dartmouth College v. Woodward, 4 Wheat. 518-714 (4:629).

³² Brown v. Maryland, 12 Wheat. 419 (6:678).

³³ National Mutual Building & Loan Assn. v. Braham, 193 U. S. 635-651 (48:823).

³⁴ Manley v. Parker, 187 U. S. 547-553 (47:296).

³⁵ Consolidated Coal Co. v. Illinois, 185 U. S. 203-212 (46:872).

³⁶ Chicago, Burlington & Quincy Railroad Company v. Chicago, 166 U. S. 226-263 (41:979).

³⁷ Meyer v. Richmond, 172 U. S. 82-101 (43:374).

³⁸ San Jose Land & Water Company v. San Jose Ranch Co., 189 U. S. 177-185 (47:765).

³⁹ Rogers v. Alabama, 192 U. S. 226-231 (49:417); Carter v. Texas, 177 U. S. 442-449 (44:839); Neal v. Delaware, 103 U. S. 370-409 (26:576).

validity in its selection and organization;⁴⁰ by a petition filed by a person indicted in the state court to remove the cause to a federal circuit court for trial, upon the ground that the defendant is by the laws of the state denied equality of civil rights;⁴¹ by reserving exceptions to the action of the trial court in admitting evidence to the jury over the objection of the party, or the rejection of evidence, an exception being duly reserved.⁴²

§ 430. Degree of certainty required in setting up the federal question.—The language of section seven hundred and nine, U. S. Revised Statutes, which defines the jurisdiction of the supreme court to review, upon writ of error, the final judgments and decrees of state courts, requires a greater degree of certainty, in setting up a federal right under the third class of cases therein mentioned, than in the first and second classes. It requires that the “title, right, privilege, or immunity” be “specially set up or claimed”—that is, “unmistakably” set up and claimed.^{42a} And the rule is firmly established, that the jurisdiction of the supreme court to re-examine the final judgment of a state court, under the third division of section seven hundred and nine of the revised statutes cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party carrying the case to the supreme court from the state court intended to assert a federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the constitution, or some treaty, statute, commission, or authority of the United States.⁴³

But the general rule deducible from the adjudicated cases, as to the first and second classes of cases mentioned in the statute is, that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case,

⁴⁰ *Neal v. Delaware*, 103 U. S. 370-409 (26:567); *Strauder v. West Virginia*, 100 U. S. 303-312 (25:664).

⁴¹ *Strauder v. West Virginia*, 100 U. S. 303-312 (25:664).

⁴² *Thompson v. Missouri* 171 U. S. 380-388 (43:204); *Haddock v. Haddock*, 201 U. S. 562-633 (50:867).

^{42a} *Oxley Stave Co. v. Butler County*, 166 U. S. 648-660 (41:1149); *Yazoo & Mississippi Valley Railroad Co. v. Adams*, 180 U. S. 1-25 (45:395).

⁴³ *Michigan Sugar Co. v. Dix*, 185 U. S. 112-114 (46:829); *Mutual Life Ins Co. v. McGrew*, 188 U. S. 291-313 (47:480).

and the case could not have been decided without deciding such question, then the fact that it was not specially set up or claimed will not defeat the jurisdiction of the supreme court.⁴⁴

§ 431. Same—Federal question must be called to attention of state court.—While it is true that, as a result of the language of the statute, less particularity is required in asserting federal rights of the first and second class, than of the third class, yet it is well settled that the right of review by the supreme court dependent upon the adverse decision of a federal question exists only in those cases where it appears from the record that the federal right relied upon has been brought by adequate specification to the attention of the state court and adversely decided by it, or unless it appears from the record that the judgment rendered could not have been given without deciding the federal question upon which the jurisdiction of the supreme court is invoked. It must appear from the record (1) that the federal right was called to the attention of the state court by adequate specification and decided by it, or (2) that the judgment rendered necessarily involved its determination.⁴⁵

§ 432. The opinion of the state court is part of the record—Certificate of the presiding judge.—The second section of the 8th supreme court rule, as modified in 1873, is as follows:

“In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.”

This provision of the rule embraces opinions of the state courts on writs of error to review their final judgments, and make such opinions part of the record.⁴⁶ While the certificate of the presiding judge of the state court as to the exist-

⁴⁴ *Columbia Water Power Co. v. Columbia Electric Street Railway, Light Power Co.*, 172 U. S. 475-493 (43:521), and authorities cited.

⁴⁵ *Harding v. Illinois*, 196 U. S. 78-88 (49:394); *Capital City Dairy Co. v. Ohio*, 183 U. S. 238-248 (46:171); *Green Bay & M. Canal Co. v.*

Patten Paper Co., 172 U. S. 58-67 (43:364).

⁴⁶ *Murdock v. Memphis*, 20 Wall. 590 (22:429); *Sayward v. Denny*, 158 U. S. 180 (39:941); *United States v. Taylor*, 147 U. S. 695 (37:335); *Gross v. United States Mortgage Co.*, 108 U. S. 477-490 (27:795).

ence of the state of case upon which the jurisdiction of the supreme court may be invoked is always regarded with respect, it cannot confer jurisdiction upon the court to re-examine the judgment of the court below; the office of such certificate, as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question.⁴⁷

§ 433. Neither petition for writ of error nor assignment of errors forms part of record.—It is well settled that neither the petition for writ of error, nor the assignment of errors therewith returned, upon a writ of error from the federal supreme court to a state court, forms any part of the record upon which action can be taken in the supreme court, nor can they supply deficiencies in the record of the state court, if any exist.⁴⁸

§ 434. The supreme court must determine its own jurisdiction.—The question whether a title, right, privilege or immunity, claimed under the constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of the state court, or whether any federal question arises upon the record, is itself a federal question, in the decision of which the federal supreme court, on writ of error, is not concluded by the view taken by the highest court of the state; but the supreme court is by the constitution vested with the exclusive power to determine for itself, and it is made its duty to so determine, the question of its own jurisdiction in all cases carried before it upon writ of error to the state courts. The

⁴⁷ *Parmelee v. Lawrence*, 11 Wall. 36 (20:48); *Powell v. Supervisors of Brunswick County*, 150 U. S. 433-442 (37:1134); *Fullerton v. Texas*, 196 U. S. 192-194 (49:443); *Allen v. Arguimbau*, 198 U. S. 149-156 (49:990); *Marvin v. Front*, 199 U. S. 212; *Henkel v. Cincinnati*, 177 U. S. 170-171 (44:720); *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63-74 (41:72); *Lawler v. Walker*, 14 How. 149; *R. R. Co. v. Rock*, 4 Wall. 177 (18:381).

⁴⁸ *Butler v. Gage*, 138 U. S. 52-61 (34:869); *Leeper v. Texas*, 139 U.

S. 462-468 (35:225); *Sayward v. Denny*, 158 U. S. 180-186 (39:941); *Warfield v. Chaffe*, 91 U. S. 690 (23:383); *Wabash Railroad Company v. Flannigan*, 192 U. S. 29-38 (48:328); *Harding v. Illinois*, 196 U. S. 78-88 (49:394); *Simmerman v. Nebraska*, 116 U. S. 54-55 (29:535); *Johnson v. New York Life Ins. Co.*, 187 U. S. 491-496 (47:273); *Telluride Power Transmission Co. v. Rio Grande Western Ry. Co.*, 187 U. S. 569-585 (47:307).

highest function of the supreme court of the United States is to maintain the supremacy of the federal constitution, laws and treaties; and, to execute this power, it must of necessity, determine its own jurisdiction in all cases where that jurisdiction is invoked. Otherwise, it would be within the power of the state courts to defeat that jurisdiction altogether.⁴⁹

§ 435. To give the supreme court jurisdiction the federal question must have been decided adversely to the plaintiff in error.—It is settled law that, to maintain the jurisdiction of the federal supreme court to re-examine, on writ of error, the final judgment or decree of a state court, it must affirmatively appear from the record, not only that a federal question was raised and presented for decision by the state court, and within the time and manner required by the state procedure, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the plaintiff in error, or that the judgment as rendered could not have been given without deciding it.⁵⁰

§ 436. Extent of the jurisdiction of the supreme court on writ of error to a state court—What questions may be reviewed.—The federal supreme court, upon writ of error to a state court, has jurisdiction to review federal questions only, and those only which are of a controlling character; and where

⁴⁹ *Carter v. Texas*, 177 U. S. 442-449 (48:839); *Neal v. Delaware*, 103 U. S. 370 (26:567); *Mitchell v. Clark*, 110 U. S. 633 (28:279); *Boyd v. Nebraska*, 143 U. S. 135 (36:103); *Newport Light Co. v. Newport*, 151 U. S. 527 (38:259); *Rogers v. Alabama*, 192 U. S. 226-231 (48:417); *Powell v. Supervisors of Brunswick County*, 150 U. S. 433-442 (38:1134).

⁵⁰ *Murdock v. Memphis*, 20 Wall. 590-642 (22:429); *Harrison v. Morton*, 171 U. S. 38-47 (43:63); *Eustis v. Bolles*, 150 U. S. 361-370 (37:1111); *Cook County v. Calumet & C. Canal & D. Co.*, 138 U. S. 635 (34:1110); *Walter A. Wood Mowing and Reaping Machine Co. v. Skinner*, 139 U. S. 293-297 (35:

193); *De Saussure v. Gaillard*, 127 U. S. 216-234 (32:125); *Brown v. Atwell*, 92 U. S. 327 (23:511); *Citizens Bank v. Board of Liquidation*, 98 U. S. 140 (25:114); *Chouteau v. Gibson*, 111 U. S. 200 (28:400); *Adams County v. Burlington & M. R. R. Co.*, 112 U. S. 123 (28:678); *Detroit City R. Co. v. Guthard*, 114 U. S. 133 (29:118); *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18 (31:607); *Johnson v. Risk*, 137 U. S. 300-309 (34:683); *Blount v. Walker*, 134 U. S. 607-614 (33:1036); *Morrow v. Brinkley*, 129 U. S. 178 (32:654); *Kansas Endowment & Benev. Assn. v. Kansas*, 120 U. S. 103 (30:593); *Church v. Kelsey*, 121 U. S. 282 (30:960).

the supreme court of a state, in rendering a final judgment, decides a federal question against the plaintiff in error, and also decides against him upon a question not federal in its nature, and the decision upon either one of the grounds is broad enough to support the judgment of the state court, the federal supreme court will affirm the decision of the state court, without considering the federal question or expressing any opinion on it, although it was wrongly decided by the state court, or else dismiss the writ of error.⁵¹ If the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment is based, and the ground independent of the federal question is sufficient in itself to sustain it, the federal supreme court will not take jurisdiction.⁵²

The federal supreme court, in a carefully considered case, stated the doctrine on this subject as follows:

“Finally, we hold the following propositions on this subject, as flowing from the statute as it now stands:

“1. That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the state court.

“2. That it must have been decided by the state court, or that its decision was necessary to the judgment or decree, rendered in the case.

“3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws or authority of the United States.

“4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

⁵¹ *Hale v. Akers*, 132 U. S. 554-565 (33:442); *Murdock v. Memphis*, 20 Wall. 590-642 (22:429); *Jenkins v. Lowenthal*, 110 U. S. 222 (28:129); *Giles v. Teasley*, 193 U. S. 146-167 (48:655); *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79 (35:943); *Eustis v. Bolles*, 150 U. S. 361 (37:

1111); *Dower v. Richards*, 151 U. S. 658 (38:305); *Wader v. Lawder*, 165 U. S. 624 (41:851).

⁵² *Allen v. Arguimbau*, 198 U. S. 149-156 (49:990); *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63 (41:72); *Klinger v. Missouri*, 13 Wall. 257 (20:635); *Johnson v. Risk*, 137 U. S. 300 (34:683).

“5. If it finds that it was rightly decided, the judgment must be affirmed.

“6. If it was erroneously decided against plaintiff in error, then this court must further enquire, whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

“7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered, or remand the case to that court, as the circumstances of the case may require.”⁵³

§ 437. **Writ of error lies to review final judgment only.**—A writ of error from the federal supreme court to a state court lies to review a final judgment only; and unless the judgment of the state court possesses the quality and character of finality the supreme court has no jurisdiction, and the writ of error will be dismissed when it appears that the judgment sought to be reviewed is not final.⁵⁴ The language of the judiciary act is that, “a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had,” where one of the enumerated federal questions is involved.⁵⁵

⁵³ *Murdock v. Memphis*, 20 Wall. 590-642 (22:429).

⁵⁴ *Houston v. Moore*, 3 Wheat. 433-435 (4:428); *Bostwick v. Brinkerhoff*, 106 U. S. 3-4 (27:73); *Johnson v. Keith*, 117 U. S. 199 (29:888); *Union Mutual Life Ins. Co. v. Kirchoff*, 160 U. S. 374-378 (40:461); *Brown v. The Marion National Bank*, 146 U. S. 619-620 (36:1106); *Rice v. Sanger*, 144 U. S. 197 (36:403); *Meagher v. Min-*

nesota Thresher Mfg. Co., 145 U. S. 608 (36:834); *Hume v. Bowie*, 148 U. S. 245 (37:438); *Werner v. Charleston*, 151 U. S. 360 (38:192); *Kimball v. Evans*, 93 U. S. 320-321 (23:920); *Drake v. Kochersperger*, 170 U. S. 303 (42:1046); *California National Bank v. Stateler*, 171 U. S. 447-449 (43:233); *Schlosser v. Hemphill*, 198 U. S. 173-176 (49:1000).

⁵⁵ U. S. Rev. Stat. sec. 709.

§ 438. **Same—Final judgment defined.**—The rule is well settled and of long standing, that a judgment or decree of a state court to be final, within the meaning of that term, as used in the federal judiciary act giving the federal supreme court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance of it in the supreme court the state court would have nothing to do but to execute the judgment or decree it had already rendered; and, consequently, it has been uniformly held that a judgment of reversal by a supreme court of a state, with leave for further proceedings in the trial court, cannot be carried to the federal supreme court on writ of error.⁵⁶ The settled rule is that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final.⁵⁷ The face of the judgment is made the test of its finality, and the supreme court cannot be called on to inquire whether, when a case is sent back, the defeated party might or might not make a better case.⁵⁸ A judgment of a state supreme court reversing the judgment of the lower court, with directions to sustain a demurrer to plaintiff's petition, is not a final judgment reviewable on writ of error, where the statutes of the state permit an amendment of the petition after the demurrer has been sustained.⁵⁹

⁵⁶ *Bostwick v. Brinkerhoff*, 106 U. S. 3-4 (27:73); *Union Mutual Life Ins. Co. v. Kirchoff*, 160 U. S. 374-378 (40:461); *Schlosser v. Hemphill*, 198 U. S. 173-176 (49:1000); *Haseltine v. Central National Bank*, 183 U. S. 130-132 (46:117); *McComb v. Knox County*, 91 U. S. 1-2 (23:185); *Moore v. Robbins*, 18 Wall. 588 (21:758); *St. Clair County v. Livingston*, 18 Wall. 628 (21:813); *Zeller v. Switzer*, 91 U. S. 487 (23:366); *Cincinnati Street Ry. Co. v. Snell*, 179 U. S. 395-398 (45:248); *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339-346 (40:991).

⁵⁷ *California National Bank v.*

Stateler, 171 U. S. 447-449 (43:233); *Craighead v. Wilson*, 18 How. 199 (15:668); *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 91 (33:275); *Lodge v. Twell*, 135 U. S. 232 (34:153); *McGourkey v. Toledo & Ohio C. Ry. Co.*, 146 U. S. 536 (36:1079); *Union Mutual Life Ins. Co. v. Kirchoff*, 160 U. S. 374 (40:985); *Hollander v. Fechheimer*, 162 U. S. 326 (40:985).

⁵⁸ *Haseltine v. Central National Bank*, 183 U. S. 136 (46:17); *Schlosser v. Hemphill*, 198 U. S. 173-176 (49:1000).

⁵⁹ *Clark v. City of Kansas City*, 172 U. S. 334-338 (43:467).

§ 439. To what court of the state the writ of error should be directed.—Inasmuch as each state was, under the federal constitution, left free to establish its own judicial system, and define the jurisdiction of its own courts, it was contemplated by the congress which passed the original judiciary act that suits would arise involving a federal question which, according to the state law, could not be carried to the highest court of the state, and it was, therefore, provided by the statute that the writ of error should run to “the highest court of a state in which a decision of the suit could be had;”⁶⁰ and, accordingly, in one of the great and leading cases, and in which the jurisdiction was most strenuously contested, the writ of error was directed to the “Court of Hustings for the borough of Norfolk,” in the state of Virginia, “it being the highest court of law or equity of that state having jurisdiction of the case,”⁶¹ and in a more recent case a writ of error from the federal supreme court was directed to the “corporation court of the city of Alexandria, state of Virginia,” that being the highest court in the state in which a decision in the suit could be had.⁶² If a decision of a suit can be had in the highest court of a state, the federal supreme court must wait for such decision before it can take jurisdiction, and it can then only examine the judgment of that court; but if the suit is one of which the highest court in the state cannot take jurisdiction, the federal supreme court may re-examine the judgment of the highest court, which under the laws of the state could decide it; and it has long been settled that if a suit cannot be taken to the highest court of a state, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of the federal supreme court,⁶³ but in such case it must affirmatively appear from the record that an application for the allowance of an appeal or writ of error to the highest court of the state was made and refused.⁶⁴

⁶⁰ U. S. Rev. Stat. sec. 709.

⁶¹ *Cohens v. Virginia*, 6 Wheat. 264-448 (5:257).

⁶² *Gregory v. McVeigh*, 23 Wall. 294-307 (23:156).

⁶³ *Gregory v. McVeigh*, 23 Wall. 294-307 (23:156); *Winsdor v. Mc-*

Veigh, 93 U. S. 274-284 (23:914);

Bacon v. Texas, 163 U. S. 207-228 (41:132); *Stanley v. Schwalby*, 162 U. S. 255 (40:960); *Clark v. Pennsylvania*, 128 U. S. 395 (32:487).

⁶⁴ *Fisher v. Carrico*, 122 U. S. 522-527 (30:1192).

§ 440. **Same**—The writ should run to the court where the record remains.—It was shown in a previous part of this chapter, that a writ of error as defined by the common law, and within the meaning of the federal judiciary act, is a writ in the nature (1) of a *certiorari* to remove a record upon which a judgment has been given from an inferior court of record into a superior court, and (2) in the nature of a commission to the judges of the superior court to examine the record, and, on such examination, to affirm or reverse the judgment according to law, and that, in removing the record the writ acts, not upon the parties, but upon the record and the court having custody of it:⁶⁵ and it is, therefore, a fundamental rule that, in the exercise of appellate jurisdiction by writ of error, the writ must be directed to the court where the record remains;⁶⁶ and if the court of a state, after deciding a cause, acting in conformity to the laws of the state, remits the record to an inferior court where the judgment is entered and the record remains, the writ of error should run to the inferior court.⁶⁷

§ 441. **Same—Same**—When the writ of error is issued before the record is sent down to the inferior court.—Although the rule is firmly established that, when the highest court of the state, in obedience to the state practice and procedure, remits the record, after decision, to the inferior court, the writ should run to the inferior court, yet it is also settled that if the writ of error be issued before the state supreme court has actually

⁶⁵ Ante, secs. 422, 423.

⁶⁶ *Atherton v. Fowler*, 91 U. S. 143-149 (23:265). *Gelston v. Hoyt*, 3 Wheat. 246-335 (4:381); *Hoagland v. Wurts*, 105 U. S. 701-703 (26:1109); *Polleys v. Black River Improvement Co.*, 113 U. S. 81-84 (28:938); *Wedding v. Meyler*, 192 U. S. 573-585 (48:570); *Lee v. Johnson*, 115 U. S. 48-53 (29:570); *People v. Squire*, 145 U. S. 175-191 (36:666); *Rothschild v. Knight*, 184 U. S. 334-342 (46:573); *McDonald v. Massachusetts*, 180 U. S. 311-313 (45:542); *Bacon v. Texas*, 163 U. S. 207-228 (41:132); *Stanley v. Schwalby*, 162 U. S. 255-283 (40:960); *Gregory v. McVeigh*, 23

Wall. 294 (23:156); *Cohens v. Virginia*, 6 Wheat. 264-448 (5:257); *Clark v. Pennsylvania*, 128 U. S. 395 (32:487); *Fisher v. Carrico*, 122 U. S. 522-527 (30:1192).

⁶⁷ *Atherton v. Fowler*, 91 U. S. 143-149 (23:265); *Gelston v. Hoyt*, 3 Wheat. 246-335 (4:381); *Hoagland v. Wurts*, 105 U. S. 701-703 (26:1109); *Polleys v. Black River Improvement Co.*, 113 U. S. 81-84 (28:938); *Wedding v. Meyler*, 192 U. S. 573-585 (48:570); *Lee v. Johnson*, 115 U. S. 48-53 (29:570); *People v. Squires*, 145 U. S. 175-191 (36:666); *Haddock v. Haddock*, 201 U. S. 562-633 (50:867).

sent the record down to the inferior court, it should be directed to the former and not to the latter court, for in contemplation of law the record is in the possession and custody of the higher court until it is actually remitted to the lower court.⁶⁸

§ 442. The writ of error the foundation of the jurisdiction. The allowance of the writ of error, and its issuance, by competent authority, and its service, constitute the foundation of the jurisdiction of the federal supreme court to review and revise the final judgments and decrees of state courts.⁶⁹ The allowance alone is not sufficient; but the writ must be actually issued and served, before the jurisdiction attaches.⁷⁰

§ 443. What judges may allow the writ of error.—Any judge authorized to sign a citation may allow the writ of error. The federal statute provides that the citation shall be signed by the chief justice, or judge or chancellor of the state court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States;⁷¹ and it is now settled that when the supreme court of a state is composed of a chief justice and several associate justices, and the judgment complained of was rendered by that court the writ of error can be allowed only by the chief justice of that court, or by a justice of the federal supreme court, but if the judgment complained of was rendered by a state court composed of a single judge or chancellor, the writ of error may be allowed by that judge or chancellor, or by a justice of the supreme court of the United States.⁷²

§ 444. What clerks authorized to issue the writ of error.—It is still an open question whether, when a writ of error is allowed by a judge of a state court to review its own judgment by the federal supreme court, the clerk of the state court has authority to issue the writ; but the federal statute gives no

⁶⁸ *Hoagland v. Wurts*, 105 U. S. 701-703 (26:1109); *New Jersey v. Wilson*, 7 Cranch. 164 (3:303); *Bridge Props. v. Hoboken Co.*, 1 Wall. 116 (17:571); *New Jersey v. Yard*, 95 U. S. 104 (24:352).

⁶⁹ *Butler v. Gage*, 138 U. S. 52-61 (34:869); *Gleason v. Florida*, 9 Wall. 779-784 (19:730); *Ex parte Ralston*, 119 U. S. 613-615 (30:506); *Hartford Fire Ins. Co. v.*

Van Duzer, 9 Wall. 784 (19:827); *Northwestern Union Packet Co. v. Ins. Co.*, 12 Wall. — (20:463).

⁷⁰ *Ex parte Ralston*, 119 U. S. 613-615 (30:506).

⁷¹ U. S. Rev. Stat. sec. 999.

⁷² *Butler v. Gage*, 138 U. S. 52-61 (34:869); *Havnor v. New York*, 170 U. S. 408-411 (42:1087); *Bartemeyer v. Iowa*, 14 Wall. 26-28 (20:792).

such authority, and it has been the prevailing custom from the beginning for the clerk of the federal supreme court, or of the United States circuit court for the proper district to issue the writ, and for such writ to be lodged with the clerk of the state court whose judgment is complained of and sought to be reviewed. It has, however, never been held that the signature of the clerk of the state court was fatal to the writ, and such irregularities have been allowed to be corrected by amendment after the return of the writ.⁷³

§ 445. Form and requisites of the writ of error.—The writ of error is the writ of the supreme court of the United States, and bears *teste* of the chief justice of the United States, or, when that office is vacant, of the associate justice next in precedence, from the day of its issuance, and runs in the name of “The President of the United States,” and is directed to the judges of the state court whose judgment is complained of and sought to be re-examined, and commands them to send under the seal of their court the record and proceedings in the cause, together with the writ, to the supreme court of the United States, within thirty days from the date of the writ.⁷⁴

§ 446. Service and return of the writ of error.—The writ of error is served by depositing a copy or the original with the clerk of the court to whose judges it is directed; and it is this filing of the writ with the clerk that removes the record from the inferior to the appellate court.⁷⁵ As to the return of the writ, the federal statute provides that: “There shall be annexed to and returned with any writ of error for the removal

⁷³ *Texas & Pacific Ry. Co. v. Kirk*, 111 U. S. 486–487 (28:481); *Miller v. Texas*, 153 U. S. 535–539 (38:812); *Ex parte Ralston*, 119 U. S. 613 (30:506); *McDonough v. Millaudon*, 3 How. 693 (11:787); U. S. Rev. Stat. secs. 1003, 1004; *Buel v. Van Ness*, 8 Wheat. 320 (5:626).

⁷⁴ U. S. Rev. Stat. secs. 911, 912, 1003, 1004, 4 Fed. Stat. Anno. 560, 561, 616; *Bondurant v. Watson*, 103 U. S. 270–280 (26:447); *Texas & Pacific Ry. Co. v. Kirk*, 111 U. S. 486–487 (28:481); Supreme Court

Rule VIII; U. S. Rev. Stat. sec. 997, 4 Fed. Stat. Anno. 605; and see form of writ transmitted by the clerk of the supreme court to the clerks of the circuit courts, under authority of the act of May 8, 1792, ch. 36, sec. 9, now section 1004 U. S. Rev. Stat. in 2 Bates Fed. Eq. Proc. pp. 1275, 1276.

⁷⁵ *Ableman v. Booth*, 21 How. 506 (16:169); *Mussina v. Cavazos*, 6 Wall. 355–363 (18:810); *Davidson v. Lanier*, 4 Wall. 447; *Wood v. Lide*, 4 Cranch, 180.

of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party;"⁷⁶ and a supreme court rule provides that, "the clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court."⁷⁷

§ 447. Same—When clerk of state court refuses to make return.—In a great case where the federal supreme court issued its writ of error to a state court to review one of its judgments, the state court ordered their clerk to disregard and refuse obedience to the writ, and to make no return thereto, which order the clerk obeyed; and upon proof by affidavit of the service of the writ, and an order upon the clerk to make return, and proof of the service of the order, and continued disobedience of the writ, the supreme court permitted a certified copy of the record of the state court produced with the application for the writ of error to be filed and to be received and entered on the docket of the court, and to have the same effect and legal operation as if returned by the clerk with the writ of error, and that the case stand for argument at the next ensuing term of the court, without further notice to either party, the citation having been duly served.⁷⁸

§ 448. The writ of error may be amended.—By the rule of the common law, a writ of error could not be amended, but by an English statute it was provided that "all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writs of error shall be made returnable,"⁷⁹ and such was the rule for a long time in the federal supreme court;⁸⁰ but that has been remedied by a federal statute, which provides as follows:

"The supreme court may, at any time, in its discretion, and

⁷⁶ U. S. Rev. Stat. sec. 997.

⁷⁷ U. S. Supreme Court Rule VIII, sec. 1.

⁷⁸ *Ableman v. Booth*, 1 How. 506-526 (16:169).

⁷⁹ 2 Tidd's Practice (1807) 1093; act 5, George I, ch. 13.

⁸⁰ *Ins. Co. v. Mordecai*, 21 How. 195; *Porter v. Foley*, 21 How. 393; *Carroll v. Dorsey*, 20 How. 264; *Hodge v. Williams*, 22 How. 87; *Wilson v. Life Ins. Co.*, 12 Pet. 140; *Deneale v. Archer*, 8 Pet. 526; *Davenport v. Fletcher*, 16 How.

upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the *teste* of the writ, or a seal of the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issuance of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, the defect has not prejudiced, and the amendment will not injure the defendant in error.”⁸¹ Under this statute, the right of a party to amend a writ of error is not absolute, but leave to amend is to be granted by the court in its discretion, and whether it should be granted in any particular case must depend upon the attending circumstances.⁸² Under this statute, the supreme court has allowed a writ of error amended, which bore a wrong *teste* and seal;⁸³ which contained a wrong return day;⁸⁴ which contained no return day at all;⁸⁵ which described either party by the name of a partnership, and not by the names of the individuals composing it;⁸⁶ which gave the christian name of the plaintiff below as Henry, when, as appeared from the record, it should have been George;⁸⁷ which named only one defendant in error, when there were more.⁸⁸

But these adjudications establish the rule that the amendment rests in the discretion of the court, and will not be allowed if there is danger of prejudice to the adverse party, or if there is any good reason against it, as, for instance, that the

142; *Miller v. McKenzie*, 10 Wall. 582; *Mussina v. Cavazos*, 6 Wall. 355; *Moulder v. Forest*, 154 U. S. 567.

⁸¹ 17 U. S. Stat. at L. ch. 255, p. 196 (act June 1, 1872); U. S. Rev. Stat. sec. 1005; 4 Fed. Stat. Anno. 617.

⁸² *Pearson v. Yewdall*, 96 U. S. 94-296 (24:436); *Walton v. Marietta Co.*, 157 U. S. 347 (39:727).

⁸³ *Texas & Pacific Ry. Co. v. Kirk*, 111 U. S. 486 (28:481).

⁸⁴ *Hampton v. Rouse*, 15 Wall. 684 (21:20); *Semmes v. United States*, 91 U. S. 21 (23:193); *National Bank of Commerce of St.*

Louis v. National Bank of Commerce of New York, 99 U. S. 608 (25:362).

⁸⁵ *Atherton v. Fowler*, 91 U. S. 143 (23:265); *Evans v. Brown*, 109 U. S. 180 (27:898).

⁸⁶ *Moore v. Simonds*, 100 U. S. 145 (25:590); *Gimble v. Pitkin*, 113 U. S. 545 (28:1128); *Estes v. Trabue*, 128 U. S. 225 (32:437); *United States v. Schoverling*, 146 U. S. 76 (36:893).

⁸⁷ *Pacific Nat. Bank of Boston v. Mixter*, 114 U. S. 463 (29:221).

⁸⁸ *Knickerbocker L. Ins. Co. v. Pendleton*, 115 U. S. 339 (29:432).

main question presented by the record has been often decided by the court adversely to the claims of the plaintiff in error.⁸⁹

§ 449. **Supersedeas upon writ of error.—A statutory remedy.** At the common law, a writ of error issued before an execution was executed was a *supersedeas* by implication without bond;⁹⁰ but, under the federal judicial system, the remedy by *supersedeas* is purely a statutory remedy, and is obtainable by a strict compliance with all the required conditions, none of which can be dispensed with, and time is an essential element in the proceeding, and one which neither the court nor the judges can disregard, and if a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from *supersedeas* as a means of staying the proceedings for its collection and enforcement.⁹¹ In order to avoid the common-law rule, and to better protect the rights of litigants, it has been enacted by congress as follows:

“In any cases where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendition of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served the writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days.”⁹² A justice of the supreme court has no power to allow a *supersedeas* in cases where no appeal or writ of error was sued out and served within sixty days, exclusive of Sundays, after the rendition of the decree or judgment complained of;⁹³ and to make a *nunc pro tunc* order for a *supersedeas* effectual, it must appear that

⁸⁹ Walton v. Marietta Co., 157 U. S. 342-348 (39:725).

⁹⁰ Tidd's Practice (1807) 1072.

⁹¹ Kitchen v. Randolph, 93 U. S. 86-92 (23:810); Sage v. Cent. Ry. Co., 93 U. S. 412-420 (23:933).

⁹² U. S. Rev. Stat. sec. 1007; 4 Fed. Stat. Anno. 618.

⁹³ Kitchen v. Randolph, 93 U. S. 86-92 (23:810).

the delay was the act of the court and not the act of the parties, and that injustice will be done unless the order be made effectual.⁹⁴

In order that a writ of error may operate as a *supersedeas*, it is necessary that a copy of the writ should be lodged for the adverse party in the clerk's office where the record remains, and that the bond approved by the judge allowing the writ should also be filed. Execution cannot issue upon the judgment until the expiration of ten days, exclusive of Sundays, from the entry thereof; and if the writ of error and bond are filed before the expiration of the ten days, no execution can issue so long as the case in error remains undisposed of. After the expiration of the ten days an execution may issue, if the writ and bond have not been filed; but, notwithstanding this, under the provisions of the statute above quoted, upon the filing of the bond and writ within sixty days from the time of the entry of the judgment, a *supersedeas* may be obtained, but it will, however, stay proceedings only from the filing of the bond, and will prevent further proceedings under the execution which has been issued, but will not interfere with what has already been done.⁹⁵

§ 450. Citation in error—By what judges signed.—When the writ of error “is issued by the supreme court of the United States to a state court, the citation shall be signed by the chief justice, or judge, or chancellor of such court, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days notice.”⁹⁶

§ 451. Service of citation in error—Upon attorney and counsel of record.—Citation in error, as was shown in a previous section, is not, in the federal judicial system, an original writ, nor the commencement of a new suit, but a summons or notice to the defendant in error to advise him that the record in the cause has been removed to the appellate court for re-examination upon points of law.⁹⁷ The federal statute provides that the

⁹⁴ *Sage v. Cent Ry. Co.*, 93 U. S. 412-420 (23:933).

⁹⁵ *Board of Commissioners v. Gorman*, 86 U. S. 661-665 (22:226); *Kitchen v. Randolph*, 93 U. S. 89 (23:810); *Foster v. Kansas*, 112 U. S. 204 (28:630).

⁹⁶ U. S. Rev. Stat. sec. 999, 4 Fed. Stat. Anno. 610; *Butler v. Gage*, 138 U. S. 52-61 (34:869); *Havnor v. New York*, 170 U. S. 408-411 (42:1087); *Bartemeyer v. Iowa*, 14 Wall. 26-28 (20:792).

⁹⁷ *Ante*, secs. 422, 423.

defendant in error "shall have at least thirty days notice,"⁹⁸ and one of the supreme court rules provides that "all appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and must be served before the return day."⁹⁹

The citation in error (as in appeal). may be served (1) upon the defendant in error, or (2) upon his attorney or counsel of record in the cause, with like effect as upon the party himself; and no attorney or counsel can withdraw his name after he has once entered it upon the record, without the leave of the court, and while his name continues there the opposite party has a right to treat him as the authorized attorney and counsel, and the service of the citation in error upon him is valid. The citation may be waived by a general appearance, or by the acceptance of service of a defective citation, or by action equivalent to an acknowledgement of notice; but the service or acknowledgement or waiver can be made upon or by no one other than the party himself or his attorney or counsel of record. But if the counsel of record is dead, the citation cannot be served upon his personal representative, nor even upon his partner, if that partner does not regularly appear on the record as counsel in the cause.¹

The necessity of the actual issue and actual service of citation, (both in writs of error and appeals, except in cases of appeals allowed in open court, or in the absence of equivalent notice or waiver), is reiterated in many cases, but much liberality is exercised by permitting service to be made during the return term, or allowing a new citation to be issued and served, where the circumstances of the case call for an exercise of the discretion of the appellate court.²

⁹⁸ U. S. Rev. Stat. sec. 999; 4 Fed. Stat. Anno. 610.

⁹⁹ U. S. Supreme Court rule VIII sec. 5.

¹ *Tripp v. Santa Rosa Street Ry. Co.*, 144 U. S. 126-130 (36:371); *United States v. Curry*, 6 How. 106-114 (12:363); *Bacon v. Hart*, 1 Black, 38 (17:52); *Villabolas v. United States*, 6 How. 81 (12:352);

Bigler v. Waller, 12 Wall. 142 (20:260); *Goodwin v. Fox*, 120 U. S. 775 (30:815); *Davis v. Waklee*, 156 U. S. 680-692 (39:578).

² *Hewitt v. Filbert*, 116 U. S. 142 (29:581); *Dayton v. Lash*, 94 U. S. 112 (24:33); *Tripp v. Santa Rosa Street Ry. Co.*, 144 U. S. 126-130 (36:371).

§ 452. **Mode of serving citation in error.**—Neither the federal statute, nor any rule of court, prescribes any mode for the serving of citation in error, the one declaring that the defendant in error shall have “notice,”³ and the other providing that the citation shall “be served.”⁴ The federal supreme court has declared that, in the service of citation in error, it cannot be governed by the varying laws of the several states upon the subject, and that service by mail will not be recognized. The court then declares that service of the citation in accordance with the thirteenth equity rule which prescribes the mode of serving a *subpoena ad respondendum* in chancery would doubtless be sufficient, which rule is as follows: “The service of all subpoenas shall be by delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in his family.”⁵ As shown in the section next preceding, the citation may be served on the attorney or counsel of record.

§ 453. **Writ of error bond.**—It is provided by statute that: “Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States, or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid.”⁶

§ 454. **The writ of error must be brought within two years.** A writ of error from the federal supreme court to review a judgment or decree of a state court must be brought within two years after the entry of the judgment; and the writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ in the inferior court that removes the record

³ U. S. Rev. Stat. sec. 999, 4 Fed. Stat. Anno. 610.

⁴ U. S. Supreme Court, rule VIII sec. 5.

⁵ *Tripp v. Santa Rosa Street Ry. Co.*, 144 U. S. 126-130 (36:371).

⁶ U. S. Rev. Stat. sec. 1000, 4 Fed. Stat. Anno. 612. For correct form of writ of error bond, see 2 Bates Fed. Eq. Proc. p. 1273.

therefrom to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly.⁷

§ 455. **Parties to writs of error.**—It is a fundamental rule of the common law, that no person can bring a writ of error to reverse a judgment who is not a party or privy to the record.⁸ Writs of error to remove the judgments of inferior courts to the federal supreme court are, under the federal judiciary act, governed by the principles and usages of the common law, and no one can bring up, as plaintiff in a writ of error, the judgment of an inferior to a superior court, unless he was a party or privy to the judgment below, nor can any one be made a defendant in the writ of error, who was not a party or privy to the judgment in the inferior court.⁹

The rule is universal that when there is a joint judgment against several defendants, and the joint interest of all is affected by the judgment, all of the parties affected thereby must join in the writ of error, or it will be quashed or dismissed, unless a severance of the parties has been effected by a summons and severance, or by some equivalent action appearing upon the record.¹⁰ A written notice to a party against

⁷ U. S. Rev. Stat. secs. 1003, 1008.
⁴ Fed. Stat. Anno. 616, 622; *Cummings v. James*, 104 U. S. 419 (26:824); *Scarborough v. Pargoud*, 108 U. S. 567-568 (27:824); *Polleys v. Black River Improvement Co.*, 113 U. S. 81-84 (28:938).

⁸ 2 *Tidd's Practice* (1807) 1052-1055; *Dougherty v. Compton*, 3 *Smedes & Marshall* (Miss.) 100; *Flournoy v. Smith*, 3 *How.* (Miss.) 62; *Beazley v. Prentiss*, 13 *Smedes & Marshall* (Miss.) 97; *Gordon v. Gibbs*, 3 *Smedes & Marshall* (Miss.) 473; *Mayer v. McLure*, 7 *George* (Miss.) 389; *Smith v. Gerloch*, 2 *Texas*, 424; *Dupree v. Perry*, 18 *Ala.* 34; *Watson v. May*, 8 *Ala.* 177; *Bayard v. Lombard*, 9 *How.* 530 (13:245); *Payne v. Niles*, 20 *How.* 219 (15:895); *Ex parte Cockcroft*, 104 U. S. 578 (26:856);

Guion v. Ins. Co., 109 U. S. 168 (27:895); *Bull v. Meloney*, 27 *Conn.* 560; *Alling v. Shelton*, 16 *Conn.* 436; *Coe v. Conn.*, 5 *Conn.* 86; *Arnett v. McCain*, 47 *Ark.* 413.

⁹ *Payne v. Niles*, 20 *How.* 219-221 (15:895).

¹⁰ *Simpson v. Greely*, 20 *Wall.* 152-158 (22:338); *Hanrick v. Patrick*, 119 U. S. 156-176 (30:396); *Williams v. Bank*, 11 *Wheat.* 414 (6:508); *Mussina v. Cavazos*, 20 *How.* 280 (15:878); *Hampton v. Rouse*, 13 *Wall.* 17 (20:593); *Smith v. Pevine & Co.*, 12 *How.* 327 (13:1008); *Davenport v. Fletcher*, 16 *How.* 142 (14:879); *O'Dowd v. Russell*, 14 *Wall.* 402-405 (20:857); *Feibleman v. Packard*, 108 U. S. 14 (27:634); *Harder v. Wilson*, 146 U. S. 179 (36:933); *Estes v. Traube*, 128 U. S. 225-230 (32:437).

whom a joint judgment has been rendered, requesting him to join in the writ of error, and his refusal to join, are, if appearing from the record, the equivalent of a summons and severance, and will sustain the writ.¹¹ A defendant against whom a separate, distinct personal judgment for money has been rendered, and in which his co-defendants have no interest, has a right to prosecute a writ of error in his own name without joining them.¹² It is well settled that the federal supreme court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm or in any other way than by their individual names; but where the record discloses the names of the parties the writ may be amended.¹³

§ 456. The plaintiff in error must have a personal interest in the federal question.—The party who brings a writ of error to reverse a judgment or decree of a state court upon the ground that the suit involves a federal question must show that he has a personal interest in the litigation and in the decision of the question. He must show that it was decided against him in the state court. The federal right claimed must be personal to the plaintiff in error, and he cannot maintain the jurisdiction of the supreme court to review the judgment upon the ground that the defendant in error asserted a federal right in the state court and obtained a decision in his favor.¹⁴ Neither will an official interest, where there is no real, sub-

¹¹ *O'Dowd v. Russell*, 14 Wall. 402-405 (20:857); *Masterson v. Herndon*, 10 Wall. 418 (19:954); *Simpson v. Greely*, 20 Wall. 158 (22:339).

¹² *Germain v. Mason*, 12 Wall. 259-261 (20:392); *Brewster v. Wakefield*, 22 How. 118 (16:301).

¹³ *Estes v. Traube*, 128 U. S. 225-230 (32:437).

¹⁴ *Smith v. Indiana*, 191 U. S. 138-150 (48:125); *Tyler v. Registration Court Judges*, 179 U. S. 405 (45:252); *Clark v. Kansas City*, 176 U. S. 114 (44:392); *Turpin v. Lemon*, 187 U. S. 51 (47:70); *Lampasas v. Bell*, 180 U. S. 276 (45:527); *Ludling v. Chaffe*, 143 U. S. 301 (36:313); *Giles v.*

Little, 134 U. S. 645 (33:1062); *Missouri v. Andriano*, 138 U. S. 497-501 (34:1012); *Henderson v. Tennessee*, 10 How. 311 (13:434); *McNulta v. Lochridge*, 141 U. S. 327-332 (35:796); *Texas & Pacific Ry. Co. v. Johnson*, 151 U. S. 81-105 (38:81); *Verden v. Coleman*, 1 Black, 472-474 (17:161); *Norwich & W. R. Co. v. Johnson*, 15 Wall. 8 (21:118); *Brown v. Smart*, 145 U. S. 454 (36:773); *Phinney v. Sheppard & E. P. Hospital*, 177 U. S. 170 (44:720); *Williams v. Eggleston*, 177 U. S. 308 (44:720); *Walworth v. Kneeland*, 15 How. 348 (14:724); *Owings v. Norwood*, 5 Cranch. 344 (3:120).

stantial personal interest, sustain the jurisdiction of the appellate court.¹⁵

§ 457. **The plaintiff in error must bring his case within the judiciary act.**—A writ of error from the federal supreme court to revise a judgment of a state court can be maintained only when it is within the purview of section seven hundred and nine of the United States revised statutes. That section defines and limits the jurisdiction of the supreme court to revise such judgments, and, to maintain the jurisdiction, the record must present some one of the questions embraced in it, and that question must be decisive of the case. If a question, not federal, was also raised and decided in the state court, and the decision of that question be found sufficient to support the judgment, the supreme court will not review it.¹⁶

§ 458. **Same—Specific classification of federal questions embraced within the statute.**—There are fourteen classes of federal questions enumerated in the statute the existence of either one of which will give the federal supreme court jurisdiction to review the final judgment or decree of a state court, namely:

(1) Where is drawn in question the validity of a treaty of the United States, and the decision is against its validity.

(2) Where is drawn in question the validity of a statute of the United States, and the decision is against its validity.

(3) Where is drawn in question the validity of an authority exercised under the United States, and the decision is against its validity.

(4) Where is drawn in question the validity of a state statute on the ground of its being repugnant to the constitution of the United States, and the decision is in favor of its validity.

(5) Where is drawn in question the validity of a state statute on the ground of its being repugnant to a treaty of the United States, and the decision is in favor of its validity.

(6) Where is drawn in question the validity of a state statute on the ground of its being repugnant to a law of the United States, and the decision is in favor of its validity.

(7) Where is drawn in question the validity of an authority

¹⁵ *Smith v. Indiana*, 191 U. S. 138-150 (48:125). *First National Bank*, 172 U. S. 425-434 (43:502).

¹⁶ *Capital National Bank v.*

exercised under a state on the ground of its being repugnant to the constitution of the United States, and the decision is in favor of its validity.

(8) Where is drawn in question the validity of an authority exercised under a state on the ground of its being repugnant to a treaty of the United States, and the decision is in favor of its validity.

(9) Where is drawn in question the validity of an authority exercised under a state on the ground of its being repugnant to a law of the United States, and the decision is in favor of its validity.

(10) Where a title, right, privilege, or immunity, is specially set up and claimed under the constitution of the United States, and the decision is against the title, right, privilege, or immunity, so set up and claimed.

(11) Where a title, right, privilege, or immunity is specially set up and claimed under a treaty of the United States, and the decision is against the title, right, privilege, or immunity, so set up and claimed.

(12) Where a title, right, privilege, or immunity, is specially set up and claimed under a statute of the United States, and the decision is against the title, right, privilege, or immunity, so set up and claimed.

(13) Where a title, right, privilege, or immunity, is specially set up and claimed under a commission held under the United States, and the decision is against the title, right, privilege, or immunity, so set up and claimed.

(14) Where a title, right, privilege, or immunity, is specially set up and claimed under an authority exercised under the United States, and the decision is against the title, right, privilege, or immunity so set up and claimed.¹⁷

(b) APPELLATE JURISDICTION OVER THE INFERIOR FEDERAL COURTS.

§ 459. Appellate jurisdiction of the supreme court over circuit and district courts.—The supreme court of the United States is vested with power and jurisdiction to review, by writ

¹⁷ U. S. Rev. Stat. sec. 709, 4 Fed. Stat. Anno. 467, 468, U. S. Comp. Stat. 1901, p. 575.

of error or appeal, according as the case may be one at law, or in equity, or in admiralty, the final judgments and decrees of the federal circuit and district courts in the following classes of cases, namely:

(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for its decision. (2) From the final sentences and decrees in prize causes. (3) In cases of conviction of a capital crime. (4) In any case that involves the construction or application of the constitution of the United States. (5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.¹⁸ (7) Appeals from interlocutory decrees granting or continuing an injunction in any suit under the interstate commerce act.¹⁹

§ 460. Same—No pecuniary limit.—There is no pecuniary limit on the right of review of the judgments and decrees of the circuit and district courts of the United States; but, in all civil cases brought and tried in those courts, an appeal or writ of error is given to review the judgment or decree, either to the supreme court or to the circuit court of appeals, without regard to the amount in controversy, one of the objects of the judiciary act of March 3, 1891, being to remove the pecuniary limit upon the right of review by appeal or writ of error.²⁰

§ 461. Same—Two years allowed in which to take appeals and writs of error.—The final judgments and decrees of the circuit and district courts, in the six classes of cases mentioned in the fifth section of the judiciary act of March 3, 1891, and of which the supreme court is given appellate jurisdiction, may be carried to the supreme court on writ of error or appeal within two years from the rendition thereof.²¹

¹⁸ 26 U. S. Stat. at L. ch. 517, sec. 5, p. 826; 29 U. S. Stat. at L. ch. 68 p. 492.

¹⁹ 34 U. S. Stat. at L. ch. 3591, sec. 15, p. 592.

²⁰ *The Paquete Habana*, 175 U. S. 677-721 (44:320).

²¹ U. S. Rev. Stat. sec. 1008, 4 Fed. Stat. Anno. 622; *Allen v. Southern Pac. R. Co.*, 173 U. S. 479-492 (43:775).

§ 462. Same—Writs of error on behalf of the United States in criminal cases where there has been no jeopardy or verdict in favor of defendant.—A recent federal statute provides:

“That a writ of error may be taken out by and on behalf of the United States from the district or circuit courts direct to the supreme court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case when there has been a verdict in favor of the defendant.”²²

§ 463. Appellate jurisdiction of the supreme court over the circuit courts of appeals.—With the exception of five classes of cases enumerated in the sixth section of the judiciary act of March 3, 1891, in which the judgments and decrees of the United States circuit courts of appeals are made final, there is in all cases decided by those courts a right of an appeal or writ of error or review by the supreme court, when the matter in controversy shall exceed one thousand dollars besides costs, if sued out within one year after the entry of the judgment or decree sought to be reviewed; and even the excepted classes of cases may be carried to the supreme court upon certiorari for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court. The classes of cases in

²² 34 U. S. Stat. at L. ch. 2564, p. 1246, Supp. 1907 Fed. Stat. Anno. 193.

which the judgments and decrees of the circuit courts of appeals are made final are: (1) In all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; (2) in all cases arising under the patent laws; (3) in all cases arising under the revenue laws; (4) in all cases arising under the criminal laws; (5) in all admiralty cases, except from final sentences and decrees in prize causes. The circuit courts of appeals may at any time certify to the supreme court any questions or propositions of law concerning which it desires instruction of that court for its proper decision.²³

§ 464. Appellate jurisdiction of the supreme court over the court of claims.—An appeal is allowed to the supreme court, on behalf of the United States, from all judgments of the court of claims adverse to the United States, regardless of the amount involved, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the court.²⁴

§ 465. Same—Time and manner of taking.—All appeals from the court of claims shall be taken within six months after the judgment is rendered, and shall be allowed under such regulations as the supreme court may direct.²⁵

§ 466. Appellate jurisdiction of the United States circuit courts of appeals.—The United States circuit courts of appeals have jurisdiction to review, upon writ of error, or appeal, the final judgments and decrees of circuit and district courts (1) in all civil cases other than the six classes of cases designated in the fifth section of the judiciary act of March 3, 1891, appellate jurisdiction over which is vested in the supreme court;²⁶ (2) in all cases of a conviction of an infamous crime not capital,²⁷ and

²³ 26 U. S. Stat. at L. ch. 517, sec. 6, p. 826.

²⁴ U. S. Rev. Stat. sec. 707, 4 Fed. Stat. Anno. 467; 22 U. S. Stat. at L. ch. 116, sec. 9, p. 485; *United States v. Davis*, 131 U. S. 36 (33: 93); *United States v. Gilliat*, 164 U. S. 41 (41:344); *De Groot v. United States*, 5 Wall. 419 (18:700);

United States v. Adams, 6 Wall. 101 (18:792).

²⁵ U. S. Rev. Stat. sec. 708, as amended by 24 U. S. Stat. at L. ch. 359, sec. 10, p. 505, 4 Fed. Stat. Anno. 467, 2 Fed. Stat. Anno. 86.

²⁶ 26 U. S. Stat. at L. ch. 517, secs. 5 and 6, p. 826.

²⁷ 29 U. S. Stat. at L. ch. 68 p. 492.

(3) over interlocutory decrees in equity granting or continuing an injunction, or appointing a receiver in any cause.²⁸

§ 466a. Same—Time allowed for taking writ of error or appeal—The writ of error or appeal from final judgments and decrees must be taken or sued out within six months after the entry thereof,²⁹ and from interlocutory decrees within thirty days from the entry of such decree.³⁰

²⁸ 34 U. S. Stat. at L. ch. 1627, p. 116.

³⁰ 34 U. S. Stat. at L. ch. 1627, p. 116.

²⁹ 26 U. S. Stat. at L. ch. 517, sec. 11, p. 826.

CHAPTER XI.

JURISDICTION OF THE FEDERAL JUDICIARY TO ISSUE WRITS OF HABEAS CORPUS.

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| <p>§ 467. Jurisdiction of the federal judiciary to grant writs of habeas corpus.</p> <p>468. What courts and judges may issue writs of habeas corpus.</p> <p>469. Supreme court may issue the writ in the exercise of either original or appellate jurisdiction.</p> <p>470. Nature and object of the writ — Cannot perform the office of a writ of error.</p> <p>471. Classes of cases in which the federal courts may issue the writ of habeas corpus.</p> <p>472. Jurisdiction of the supreme court to issue the writ when the prisoner is held under a void judgment of a federal court.</p> <p>473. Same—Writ may issue before a final judgment.</p> <p>474. Same—Same—Inquiry into the jurisdiction of inferior courts may extend to facts outside the record.</p> <p>475. Jurisdiction to issue the writ when prisoner is held under void judgment of court martial.</p> | <p>§ 476. Jurisdiction to issue the writ when prisoner is held under void sentence of military commission.</p> <p>477. Same—Jurisdiction of supreme court to issue writ when circuit court remands prisoner.</p> <p>478. Jurisdiction to issue the writ when the prisoner is in custody under state authority in contravention of federal authority.</p> <p>479. Same—Cases of urgency requiring immediate action.</p> <p>480. Same — Interstate extradition.</p> <p>481. Same — Same — Concurrent jurisdiction of state courts.</p> <p>482. Application for the writ of habeas corpus.</p> <p>483. The award and direction of the writ.</p> <p>484. Return of the writ.</p> <p>485. Same — Production of the body.</p> <p>486. Day set for hearing—Pleadings.</p> <p>487. Same — Summary hearing and disposition of the party.</p> |
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§ 467. Jurisdiction of the federal judiciary to grant writs of habeas corpus.—The federal constitution declares that, “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety

may require it,"¹ and, acting under the immediate influence of this declaration, the first congress, in order to give effect to this great constitutional privilege, by the fourteenth section of the original judiciary act, gave to all the courts of the United States the power to issue writs of habeas corpus;² and it was early decided that this section of the act vested in the supreme court jurisdiction to issue the writ, not merely as an auxilliary writ in aid of the jurisdiction of the court over a cause previously acquired, but as an independent and original proceeding, and in the exercise of an independent substantive judicial power,³ and this jurisdiction has been expanded by subsequent legislation, and has long been employed as one of the methods of maintaining the supremacy of the constitution, laws and treaties of the United States,⁴ and in the protection of personal liberty against unlawful restraints, in so far as that duty lies within the purview of the federal government.⁵

§ 468. **What courts and judges may issue writs of habeas corpus.**—The supreme court and the circuit and district courts have power to issue writs of habeas corpus;⁶ and the several justices and judges of said courts, within their respective jurisdictions, have power to grant writs of habeas corpus for the purpose of enquiring into the cause of restraint of liberty.⁷ But the United States circuit courts of appeals have no jurisdiction to issue writs of habeas corpus, as an independent and original proceeding.⁸

§ 469. **Supreme court may issue the writ in the exercise of either original or appellate jurisdiction.**—The power of the supreme court to issue the writ of habeas corpus is a part of the judicial power vested in it by the federal constitution, and must be exercised within the limits of the grant, and the divid-

¹ U. S. Const. art. I, sec. 9, cl. 2.

² 1 U. S. Stat. at L. ch. 20, sec. 14, pp. 73-79.

³ *Ex parte Bollman*, 4 Cranch, 75-141 (2:554); *Ex parte Watkins*, 3 Pet. 193-207 (7:650).

⁴ *Whitten v. Tomlinson*, 160 U. S. 231-247 (40:406); *Cunningham v. Neagle*, 135 U. S. 1-99 (34:55); *Thomas v. Loney*, 134 U. S. 372 (33:949).

⁵ *Ex parte Milligan*, 4 Wall. 2-

142 (18:281); *Ex parte Yerger*, 8 Wall. 85-106 (19:332); *Ex parte Lange*, 18 Wall. 162 (21:875).

⁶ U. S. Rev. Stat. sec. 751, 3 Fed. Stat. Anno. 162, U. S. Comp. Stat. 1901, p. 592.

⁷ U. S. Rev. Stat. sec. 752, 3 Fed. Stat. Anno. 167, U. S. Comp. Stat. 1901, p. 592.

⁸ *Whitney v. Dick*, 202 U. S. 132-141 (50:963).

ing line between original and appellate jurisdiction applies to this subject as well as to all others; and the supreme court may issue the writ of habeas corpus in the exercise of either its original or appellate jurisdiction, when a proper case is presented for either. Ordinarily it issues the writ in the exercise of appellate jurisdiction, for the purpose of reviewing the judicial decision or action of some inferior court or officer, but the court may issue it in the exercise of original jurisdiction in a case where it has original jurisdiction and the circumstances require it. It is well settled that the appellate jurisdiction may be exercised directly by habeas corpus where the writ is an appropriate remedy.*

§ 470. **Nature and object of the writ—Cannot perform the office of a writ of error.**—Inasmuch as the federal constitution is written in the language of the common law, and the writ of habeas corpus is a great common-law writ, for centuries esteemed by the English people as their best and only sufficient defense of personal freedom, firmly guaranteed by the famous habeas corpus act of 31st Charles II, “for the better securing of the liberty of the subject,” brought to America by the colonists and claimed by them as an immemorial right descended to them from their ancestors, and confirmed unto the people of the Union by constitutional guaranty without definition as a known and existing right, the federal courts have felt authorized to look to the common law for a definition of the nature and object of the remedy given by the writ; and, as defined by the principles of the common law, the great object of the writ was the speedy liberation of persons imprisoned or restrained of their liberty without sufficient cause, and this object was achieved by a judicial inquiry into the legality of the commitment, and the discharge of the prisoner, if, upon such inquiry, the cause of commitment was found to be insufficient. The writ proceeded, not by a mere correction of errors, but by a direct attack upon the validity of the order of commitment. The question brought forward and presented for decision upon the writ of habeas corpus was always distinct

* Ex parte Siebold, 100 U. S. 404–332); Ex parte Bollman, 4 Cranch, 422 (25:717); Hung Hang, 108 U. 75 (2:554); Ex parte Watkins, 3 S. 552–553 (27:811); Ex parte Pet. 193 (7:650); Ex parte Wells, Barry, 2 How. 65–66 (11:181); Ex 18 How. 307 (15:421).
parte Yerger, 8 Wall. 85–106 (19:

from the question involved in the case itself; and the question whether the individual should be imprisoned or discharged was always distinct from the question whether he should be convicted or acquitted of the charge upon which he was to be tried, and those questions being distinct and separate might be decided by different courts. The decision that the individual should be imprisoned always preceded the application for the writ of habeas corpus, and the writ was sued out for the purpose of revising the order of commitment, and, although appellate in its nature, it was not for the purpose of correcting errors upon a trial of the offense charged upon its merits. The revision was directed at the order of commitment, to ascertain whether it was based upon sufficient cause.¹⁰ This view of the nature of a writ of habeas corpus was adopted by the federal judiciary, and while it is well and definitely settled that the supreme court of the United States may issue a writ of habeas corpus, in the exercise of its appellate jurisdiction, for the purpose of passing upon the validity of the order of commitment, yet it is equally well settled that the writ cannot be made to perform the office of a writ of error for the correction of errors which may have occurred in the trial of the cause in the court below, but is a direct attack upon the validity of the judgment complained of, upon the ground that, for want of jurisdiction, or because in excess of the power of the court to render, it is null and void.¹¹

§ 471. **Classes of cases in which the federal courts may issue the writ of habeas corpus.**—The jurisdiction of the courts of the United States to issue writs of habeas corpus is limited to five classes of cases, namely: (1) To cases of persons alleged to be restrained of their liberty under or by color of the au-

¹⁰ *Ex parte Watkins*, 3 Pet. 193-209 (7:650); *Ex parte Yerger*, 8 Wall. 85-106 (19:332); *Ex parte Bollman*, 4 Cranch, 75-137 (2:554).

¹¹ *Valentina v. Mercer*, 201 U. S. 131-140 (50:693); *Felts v. Murphy*, 201 U. S. 123-130 (50:689); *Ex parte Lennon*, 166 U. S. 548-557 (41:1110); *Re Eckart*, 166 U. S. 481-485 (41:1085); *Ex parte Bigelow*, 113 U. S. 328-331 (28:1005); *Whitney v. Dick*, 202 U. S. 132-

141 (50:963); *Riggins v. United States*, 199 U. S. 547-551 (50:303); *Dimmick v. Tompkins*, 194 U. S. 540-552 (48:1110); *Ex parte Royal*, 117 U. S. 241 (29:868); *Ex parte Lange*, 18 Wall. 163 (21:872); *Ex parte Nielsen*, 131 U. S. 176-191 (33:118); *Ex parte Slobod*, 100 U. S. 371 (25:717); *Re Snow*, 120 U. S. 274 (30:658); *Ex parte Parks*, 93 U. S. 18-24 (23:787).

thority of the United States, or are committed for trial before some court thereof; (2) to cases of persons alleged to be restrained of their liberty for an act done or omitted in pursuance of a law of the United States, or an order, process, or decree of a court thereof; (3) to cases of persons alleged to be restrained of their liberty in violation of the constitution or of a law or a treaty of the United States; (4) to cases of persons alleged to be restrained of their liberty, being subjects or citizens of a foreign state, and domiciled therein, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; and (5) where it is necessary to bring the prisoner into court to testify. In order to obtain the benefit of the writ, and to procure its being issued by the court or justice or judge who has the authority to order it to issue, it should be made to appear upon the application for the writ, that such application is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the constitution or laws or treaties of the United States, or under the laws of nations.¹²

§ 472. Jurisdiction of the supreme court to issue the writ when the prisoner is held under a void judgment of a federal court.—The power of the supreme court to issue a writ of habeas corpus for the purpose of inquiring into the cause of restraint of the person in whose behalf the writ is asked, is expressly conferred by statute, and extends to the cases, among others, of prisoners in jail under or by color of the authority of the United States, and of persons who are in custody in violation of the constitution and laws of the United States; and, therefore, if a prisoner be imprisoned under a judgment of a federal circuit or district court, which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, the supreme court will, upon complaint in writing, signed by, and verified by the oath of

¹² U. S. Rev. Stat. sec. 753, 3 (34:500); *Storti v. Massachusetts*, Fed. Stat. Anno. 167, U. S. Comp. 183 U. S. 138-144 (46:120); *Andrews v. Swartz*, 156 U. S. 272-276 Stat. 1901, p. 592; *Carfer v. Caldwell*, 200 U. S. 293-297 (50:488); (39:422); *Cunningham v. Neagle*, Ex parte *Burrus*, 136 U. S. 586-627 135 U. S. 1-99 (34:55).

the prisoner as required by the statute, showing the facts, direct the writ of habeas corpus to issue, accompanied by a writ of *certiorari* to bring before the court a certified copy of the proceedings of the circuit or district court under which the petitioner is restrained of his liberty, and upon return of the writ and record will discharge the prisoner.¹³

§ 473. Same—Writ may issue before final judgment.—It is not necessary that a final judgment should have been rendered by the circuit or district court, in order to authorize the supreme court to issue its writ of habeas corpus to inquire into the authority and jurisdiction of such inferior courts to restrain the prisoner of his liberty, but the writ may issue, upon a proper application, where the applicant has been committed for trial before such courts.¹⁴ The writ has been issued by the supreme court to review a commitment under a warrant of a district judge,¹⁵ and to review a commitment by the circuit court of the District of Columbia,¹⁶ and to review a commitment under an indictment and bench-warrant issued by a district court and the return of the marshal, showing the arrest of the prisoner and his detention in custody.¹⁷ In all such cases, the supreme court has the authority under the constitution and laws of the United States to issue the writs of *habeas corpus* and *certiorari*, and to examine the proceedings of the inferior court to ascertain whether that court has exceeded its authority, and to discharge the prisoner if found to be without any lawful authority.¹⁸

¹³ U. S. Rev. Stat. sec. 753, 3 Fed. Stat. Anno. 167, U. S. Comp. Stat. 1901, p. 592; *Ex parte Lange*, 18 Wall. 163-205 (21:872); *Ex parte Terry*, 128 U. S. 289-314 (32:405); *Ex parte Siebold*, 100 U. S. 37-399 (25:717); *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75 (2:554); *Ex parte Watkins*, 3 Pet. 193 (7:650); *Ex parte Tyler*, 149 U. S. 164-192 (37:689); *Ex parte Virginia*, 100 U. S. 339-370 (25:677); *United States v. Hamilton*, 3 Dall. 17; *Ex parte Yarbrough*, 110 U. S. 651-

667 (28:274); *Ex parte Mayfield*, 141 U. S. 107-116 (35:635).

¹⁴ U. S. Rev. Stat. 753, 3 Fed. Stat. Anno. 167, U. S. Comp. Stat. 1901, p. 592.

¹⁵ *United States v. Hamilton*, 3 Dall. 17.

¹⁶ *Ex parte Burford*, 3 Cranch, 448.

¹⁷ *Ex parte Virginia*, 100 U. S. 339-370 (25:676).

¹⁸ *Ex parte Lange*, 18 Wall. 163 (21:872); *Ex parte Virginia*, 100 U. S. 339-370 (25:672); *Ex parte Mayfield*, 141 U. S. 107-116 (35:635).

§ 474. **Same—Same—Inquiry into the jurisdiction of inferior court may extend to facts outside the record.**—Upon a writ of habeas corpus issued by the supreme court upon the ground that the prisoner is restrained of his liberty by an order or judgment of an inferior court made in excess of its authority, the supreme court has the power to inquire into the jurisdiction of the inferior court, either in respect to the subject-matter or the person, or the power to enter the particular judgment, even if such inquiry involves an examination of facts outside of, but not inconsistent with the record sent up in obedience to the writ of *certiorari*.¹⁹

§ 475. **Jurisdiction to issue the writ when prisoner is held under void judgment of court martial.**—A court-martial organized under the laws of the United States is a court of special and limited jurisdiction, called into existence for a special purpose and to perform a particular duty, and when the object of its creation has been accomplished it is dissolved. It is not a court of record, but is one of those inferior courts of limited jurisdiction, whose judgments may be collaterally questioned. To give effect to the sentences of a court-martial, it must appear affirmatively and unequivocally that the court was legally constituted, that it had jurisdiction of the party and the subject-matter, that all the statutory regulations governing its proceedings have been complied with, and that its judgment and sentence are conformable to law; and if the court be illegally constituted, or it be without jurisdiction of the parties or the subject-matter, or if its sentence and judgment be in excess of the powers conferred upon it by statute, they are absolutely void, and the party restrained of his liberty under such sentence and judgment may be discharged upon writ of *habeas corpus* issued by the circuit or district courts.²⁰ It is not definitely settled that the supreme court can issue the writ in such cases.²¹

§ 476. **Jurisdiction to issue the writ when prisoner is held under void sentence of military commission.**—A prisoner held under the void sentence of a military commission, may be dis-

¹⁹ *Ex parte Mayfield*, 141 U. S. 107-116 (35:635); 147-157 (34:636); *Johnson v. Sayer*, 158 U. S. 109 (39:914); *Ex parte Mason*, 105 U. S. 696-701 (26:1213).

²⁰ *McClaghry v. Deming*, 186 U. S. 49-70 (46:1049); *Ex parte Reed*, 100 U. S. 13-26 (25:538); *United States v. Grimly*, 137 U. S. 701 (26:1213).
²¹ *Ex parte Mason*, 105 U. S. 696-701 (26:1213).

charged upon writ of habeas corpus issued by the circuit court of the United States for the proper district;²² but there is no original jurisdiction in the supreme court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse the proceedings of a military commission, nor to issue the writ of *certiorari* to revise such proceedings.²³

§ 477. **Same—Jurisdiction of supreme court to issue writ when circuit court remands prisoner.**—In all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, the supreme court, in the exercise of its appellate jurisdiction, may, by writ of habeas corpus, aided by the writ of *certiorari*, revise the decision of the circuit court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded; and, where a circuit court issued a writ of habeas corpus for a prisoner, who was detained by a military commission for trial upon a charge of murder, and upon the return proceeded to hear argument and adjudged that the imprisonment of the petitioner was lawful, and passed an order that the writ of habeas corpus be dismissed, and that the prisoner be remanded to the custody of the military officer who brought him into court, to be held and detained to answer the charge of murder before the military commission, the supreme court affirmed its jurisdiction to issue the writ of habeas corpus to inquire into the cause of detention alleged to be unlawful, and to give relief if the detention should be found in fact to be unlawful.²⁴

§ 478. **Jurisdiction to issue the writ when the petitioner is in custody under state authority in contravention of federal authority.**—The circuit courts of the United States, and the judges thereof, are vested with power, upon writ of habeas corpus, to restore to liberty any person, within their respective jurisdictions, who is held in custody, by any authority whatever, though it be the authority of a state, in violation of the constitution or any law of the United States. But, while the circuit court has the power and jurisdiction to discharge

²² *Ex parte Milligan*, 4 Wall. 2-142 (18:281).

²⁴ *Ex parte Yerger*, 8 Wall. 85-106 (19:332).

²³ *Ex parte Vallandigham*, 1 Wall. 243-254 (17:589).

a prisoner accused in a state court in advance of his trial, if he be restrained in violation of the constitution or a law of the United States, it has a legal discretion as to the time and mode in which it will exercise the power conferred upon it in such cases, which will be exercised in the light of the relations existing, under our dual system of government, between the judicial tribunals of the union and the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution: and where a person is in custody under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the constitution or a law of the United States, the circuit court has a discretion to be subordinated to any special circumstances requiring immediate action, whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is charged or indicted; and when the state court shall have finally acted upon his case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the United States supreme court to the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution or a law of the United States; and it seems to be now definitely settled that one convicted in a state court of an alleged violation of the criminal statutes of the state, and who contends that he is held in violation of the constitution or a law of the United States, must, in the absence of special circumstances requiring immediate action, first take his case to the highest court of the state in which the judgment could be reviewed, and thence bring it, if unsuccessful there, by writ of error to the supreme court of the United States, and only in certain exceptional cases will a circuit court of the United States, or the supreme court upon appeal from a circuit court, intervene by writ of habeas corpus in advance of the final action of the highest court of the state.²⁵

²⁵ *Ex parte Royal*, 117 U. S. 241- 155 U. S. 89-99 (39:80); *Ex parte*
254 (29:868); *New York v. Eno*, *Fonda*, 117 U. S. 516 (29:94);

§ 479. **Same—Cases of urgency requiring immediate action.** When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depends upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writ of habeas corpus and discharged prisoners who were held in custody under state authority.²⁶

§ 480. **Same—Interstate extradition.**—An agent appointed by the demanding state in which a fugitive from justice stands charged with a crime, to receive such fugitive from the state by which he is surrendered, is not an officer of the United States within the meaning of the adjudications of the federal supreme court, but is the agent of the demanding state, as well in receiving custody of the fugitive, as in transporting him to the state under whose commission he acts;²⁷ and a warrant of extradition of the governor of a state, issued upon the requisition of the governor of another state, accompanied by a duly authenticated copy of an indictment, is *prima facie* evidence,

Duncan v. McCall, 139 U. S. 449 (35:219); Wood v. Brush, 140 U. S. 278 (35:505); Jugiro v. Brush, 140 U. S. 291 (35:510); Cook v. Hart, 146 U. S. 183 (36:934); Ex parte Frederich, 149 U. S. 70 (37:653); Pepke v. Cronan, 155 U. S. 100 (39:84); Bergmann v. Backer, 157 U. S. 655 (39:845); Whitten v. Tomlinson, 160 U. S. 231-247 (40:406); Minnesota v. Brundage, 180 U. S. 499-505 (45:639); Reid v. Jones, 187 U. S. 153-154 (47:116); Pettibone v. Nichols, 203 U. S. 192-221 (51:148).

²⁶ Cunningham v. Neagle, 135 U.

S. 1 (34:55); Thomas v. Lonly, 134 U. S. 372 (33:949); Mall v. Hudson County Jail Keeper (Mildenhush Case) 120 U. S. 1 (30:565); Ex parte Royal, 117 U. S. 245-254 (29:868); New York v. Eno, 155 U. S. 89-95 (39:80); Ohio v. Thomas, 173 U. S. 276-284 (43:699); Boske v. Comingore, 177 U. S. 459 (44:846); Minnesota v. Brundage, 180 U. S. 499-505 (45:639).

²⁷ Robb v. Connolly, 111 U. S. 624 (28:542); Roberts v. Reilly, 116 U. S. 80-97 (29:544).

at least, that the accused had been indicted and was a fugitive from justice, and, when the court in which the indictment was found has jurisdiction of the offense, is sufficient to make it the duty of the court of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner in the state in which he was indicted to be inquired into and determined, in the first instance, by the courts of the state which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the constitution and laws of the United States.²⁸ Upon an application for a warrant of extradition, two questions are, under the federal statute,²⁹ presented to the governor upon whom the demand is made, namely, (1) whether the person demanded has been substantially charged with a crime against the laws of the demanding state, and (2) whether he is a fugitive from justice, the first being a question of law, and the second a question of fact which the governor upon whom the demand is made must decide upon such evidence as is satisfactory to him. In deciding the question of fact, strict common-law evidence is not necessary. The federal statute does not prescribe the particular kind or quantity of evidence to be produced before the governor, nor how it shall be authenticated, but it must be such as is satisfactory to the mind of the governor. The person demanded has no constitutional right to be heard before governor on either the question of law or the question of fact, and the federal statute gives no such right, and it is not error for the governor to refuse such a hearing. The issuing of the warrant of extradition by the governor, with or without a recital therein that the person demanded is a fugitive from justice, is sufficient to justify his removal, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof adduced in an appropriate legal proceeding brought to review the action of the governor; and after issuing the warrant, and before the deportation of the

²⁸ Whitten v. Tomlinson, 160 U. S. 231-247 (40:406); Robb v. Connolly, 111 U. S. 624 (28:542); Roberts v. Reilly, 116 U. S. 80-97 (29:544); Ex parte Reggel, 114 U. S. 642 (29:250); Cook v. Hart, 146

U. S. 183 (36:934); Pearce v. Texas, 155 U. S. 311 (39:164); Pettibone v. Nichols, 203 U. S. 192-221 (51:148); Appleyard v. Massachusetts, 203 U. S. 222-232 (51:161).

²⁹ U. S. Rev. Stat. sec. 5278.

person demanded, it is competent for a court, either state or federal, sitting in the state where the warrant is issued and the arrest is made, to inquire, upon writ of habeas corpus, whether the accused is in fact a fugitive from justice, and, if found not to be, to discharge him from the custody of the agent of the demanding state, and prevent his deportation.³⁰ While the indictment, to authorize the issue of a warrant of extradition, should set forth a substantial criminal charge, yet its sufficiency as a matter of technical pleading, will not be inquired into on a writ of habeas corpus.³¹ No obligation is imposed by the constitution or laws of the United States upon the agent of the demanding state, to so time the arrest of the alleged fugitive from justice, and to so conduct his deportation from the surrendering state, as to afford him a convenient opportunity to test, before some competent judicial tribunal sitting in that state, the question whether he is in fact a fugitive from justice, and, as such, liable under the act of congress to be conveyed to the demanding state.³²

§ 481. ~~Same—Same—~~Concurrent jurisdiction of state courts. The jurisdiction of the federal courts and the judges thereof, to inquire, upon writ of habeas corpus, into the legality of the detention of persons arrested and held upon warrants of extradition, and to discharge them, if it be ascertained that such detention is illegal, is not an exclusive jurisdiction; but, in all such cases, the state courts and the judges thereof are vested with jurisdiction, concurrent with the federal courts and judges. Upon the courts of the state, equally with the courts of the United States, rests the obligation to guard, enforce and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever any such rights are involved in any suit or proceeding before them, and it is presumed that such courts will in good faith perform their obligations, and if they fail therein and withhold or deny any rights, privileges or immunities se-

³⁰ *Munsey v. Clough*, 196 U. S. 364-375 (49:515); *Hyatt v. New York*, 188 U. S. 691 (47:657); *Robb v. Connolly*, 111 U. S. 624-639 (28:542); *Ex parte Reggel*, 114 U. S. 642 (29:250); *Pettibone v. Nichols*, 203 U. S. 192-221 (51:148).

³¹ *Munsey v. Clough*, 196 U. S. 364-375 (49:515); *Ex parte Reggel*, 114 U. S. 642 (29:250); *Pearce v. Texas*, 155 U. S. 311 (39:164); *Ex parte Hart*, 59 Fed. R. 894.

³² *Pettibone v. Nichols*, 203 U. S. 192-221 (51:148).

cured by the constitution and laws of the United States, the party aggrieved may carry his case, even though in a proceeding for habeas corpus, from the highest court of the state in which the question could be decided, to the supreme court of the United States for final and conclusive determination.³³

§ 482. Application for the writ of habeas corpus.—Application for the writ of habeas corpus should be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known; and the averments of facts set forth in the complaint must be verified by the oath of the person making the application.³⁴ The general allegation in the complaint, that the petitioner is detained in violation of the constitution and laws of the United States, and is held without due process of law, are averments of mere conclusions of law and not matters of fact.³⁵

§ 483. The award and direction of the writ.—The court or justice or judge to whom the application is made shall forthwith award the writ of habeas corpus, unless it appears from the petition or application itself that the party is not entitled thereto; and the writ shall be directed to the person in whose custody the party is detained.³⁶ The writ ought not to be awarded, if the court is satisfied from the application that the prisoner, if brought into court and the cause of his commitment inquired into, would be remanded to prison.³⁷

§ 484. Return of the writ—Time and form.—Any person to whom the writ of habeas corpus is directed shall make due return thereof within three days thereafter, unless the party be

³³ *Robb v. Connolly*, 111 U. S. 624-640 (28:542); *Munsey v. Clough*, 196 U. S. 364-375 (49:515); *Hyatt v. New York*, 188 U. S. 691-719 (47:657).

³⁴ U. S. Rev. Stat. sec. 754, 3 Fed. Stat. Anno. 172, U. S. Comp. Stat. 1901, p. 593; *Ex parte Cuddy*, 131 U. S. 280-287 (33:154).

³⁵ *Whitten v. Tomlinson*, 160 U. S. 231-274 (40:406); *Cramer v. Washington*, 168 U. S. 124-131 (42:

407); *Andersen v. Treat*, 172 U. S. 24-31 (43:351).

³⁶ U. S. Rev. Stat. sec. 755, 3 Fed. Stat. Anno. 173, U. S. Comp. Stat. 1901, p. 593.

³⁷ *Ex parte Watkins*, 3 Pet. 193 (7:650); *Ex parte Terry*, 128 U. S. 289-314 (32:405); *Ex parte Kearney*, 7 Wheat. 38-45 (5:391); *Ex parte Milligan*, 4 Wall. 2-11 (18:281).

detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of the party.³⁸

§ 485. **Same—Production of the body.**—The person making the return to the writ of habeas corpus shall at the same time bring the body of the party before the judge who granted the writ.³⁹

§ 486. **Day set for hearing—Pleadings.**—When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. The petitioner or party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.⁴⁰

§ 487. **Same—Summary hearing and disposition of the party.**—The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.⁴¹ But when the petitioner is in custody under state authority, and claims that he is restrained of his liberty in violation of the constitution or a law of the United States, the courts, judges and justices of the United States have a discretion as to the time and mode of granting the petitioner relief upon writ of habeas corpus.⁴²

³⁸ U. S. Rev. Stat. sec. 756, 757, 3 Fed. Stat. Anno. 173, U. S. Comp. Stat. 1901, p. 593; *Ex parte Baez*, 177 U. S. 378-390 (44:813).

³⁹ U. S. Rev. Stat. sec. 758, 3 Fed. Stat. Anno. 174, U. S. Comp. Stat. 1901, p. 593.

⁴⁰ U. S. Rev. Stat. secs. 759, 760, 3 Fed. Stat. Anno. 174, U. S. Comp. Stat. 1901, p. 594.

⁴¹ U. S. Rev. Stat. sec. 761, 3 Fed. Stat. Anno. 174, U. S. Comp. Stat. 1901, p. 594; *Motherwell v. United States*, 107 Fed. 437; *Cunningham v. Neagle*, 135 U. S. 1-99 (34:55); *Storti v. Massachusetts*, 183 U. S. 138-144 (46:120).

⁴² *Ante*, sec. 478.

CHAPTER XII.

THE JURISDICTION OF THE SUPREME COURT TO ISSUE WRITS OF PROHIBITION, MANDAMUS AND CERTIORARI.

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502. Jurisdiction to issue the writ under the original judiciary act.

503. Same—Court cannot issue the writ when it has no jurisdiction over the case.

504. Same—Writ cannot issue to review proceedings of military tribunal.

505. Jurisdiction to issue the writ under the judiciary act of March 3, 1891.

(a) THE WRIT OF PROHIBITION.

§ 488. Writ of prohibition defined.—A writ of prohibition is a common-law writ issuing out of a superior court, directed to a court of peculiar, limited or inferior jurisdiction inhibiting it from assuming jurisdiction of a matter beyond its legal

cognizance, or exceeding its jurisdiction in matters of which it has cognizance. The writ lies only to restrain the unlawful exercise of judicial functions, and acts of a mere ministerial, administrative or executive character are not within the purview of the remedy afforded by it. When the suit complained of is brought by a private person, he may be joined as a defendant in the writ, but when the suit or prosecution is by or on behalf of the government the writ can go to the court only. The direction of the writ to the parties to the suit is merely incidental to the prohibition laid upon the court.¹

§ 489. The writ is preventive—Will not lie after the cause is ended.—A writ of prohibition will never be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or *certiorari* to correct the mistakes of that court in deciding any question of law or fact within its jurisdiction. The writ cannot be used except to prevent the doing of something about to be done; it will never be issued to correct acts already completed. It commands the court to which it is directed not to do something which it is about to do, and will not issue after the cause is ended.²

§ 490. Jurisdiction of the supreme court of the United States to issue the writ of prohibition.—The jurisdiction of the courts of the United States is special and limited, and derived alone from the constitution and laws of the United States; and under the present judicial arrangement, the supreme court can issue the writ of prohibition to the district courts only, and to them only in cases of admiralty and maritime jurisdiction.³

¹ 3 Bl. Com. 112; *Smith v. Whitney*, 116 U. S. 167-186 (29:601); *Ex parte Brandlocht*, 2 Hill, 367; *Thompson v. Tracy*, 60 N. Y. 31; *Connecticut River Railroad v. Franklin County Com'rs*, 127 Mass. 50; *State v. Gray*, 33 Wis. 93; *Homes Ins. Co. v. Flint*, 13 Minn. 244; *Ex parte Williams*, 4 Ark. 537, S. C. 38 Am. Dec. 46; *Claytin v. Heldleberg*, 9 Smedes & M. (Miss.) 623; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Ex parte Easton*, 95 U. S. 68-78 (24:

373); *Ex parte Cooper*, 143 U. S. 472-513 (36:232).

² *Smith v. Whitney*, 116 U. S. 167-186 (29:601); *Ex parte Gordon*, 104 U. S. 515 (26:814); *Ex parte Detroit River Ferry Co.*, 104 U. S. 519 (26:815); *Ex parte Hager*, 104 U. S. 520 (26:816); *Ex parte Pennsylvania*, 109 U. S. 174 (27:894); *United States v. Hoffman*, 4 Wall. 158 (18:354); *Ex parte Easton*, 95 U. S. 68 (24:373).

³ U. S. Rev. Stat. sec. 688, U. S. Comp. Stat. 1901, p. 565, 4 Fed.

Several applications have been made for writs of prohibition to circuit courts, but there is no instance in which the writ ever issued to a circuit court.⁴

§ 491. **When the writ will be granted.**—When it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the case originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right, in those cases in which the law authorizes its issuance; but where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends upon facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory when the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings.⁵

§ 492. **The want of jurisdiction must appear from the record.**—In an application for a writ of prohibition, whether the district court has exceeded its jurisdiction or not must be determined upon the facts stated in the record upon which the court is called to act, and by which alone it can regulate its judgment, and not upon facts *dehors* the record set up in the application for the writ.⁶

§ 493. **The writ of prohibition not of great importance in the federal judicial system.**—Inasmuch as the federal judiciary act of March 3, 1891, gives a remedy by writ of error or appeal in all cases decided by the circuit and district courts of the United States, and that without regard to the sum or value in controversy, the writ of prohibition is no longer of any great importance in the federal judicial system. In every case when

Stat. Anno. 439; *Ex parte Christy*, 3 How. 292 (11:603); *Ex parte Gordon*, 1 Black, 503-506 (17:134); *Ex parte Graham*, 10 Wall. 541-543 (19:981).

⁴ *Ex parte Warmouth*, 17 Wall. 64 (21:543); *Re Balz*, 135 U. S. 404 (34:222); *Smith v. Whitney*, 116 U. S. 172 (29:602); *Re Rice*, 155 U. S. 396 (39:198).

⁵ *Re Rice*, 155 U. S. 396-403 (39:198); *Smith v. Whitney*, 116 U. S. 167 (29:601); *Ex parte Cooper*, 143 U. S. 472 (36:232); *Re Huguley Mfg. Co.*, 184 U. S. 297-302 (46:549).

⁶ *Ex parte Easton*, 95 U. S. 68 (24:373).

the jurisdiction of the district or circuit court is in issue, the case may go directly to the supreme court.⁷

(b) THE WRIT OF MANDAMUS.

§ 494. **The writ of mandamus defined.**—By the common law.—“The writ of mandamus is a prerogative writ, containing a command in the king’s name, and issuing from the court of king’s bench, directed to persons, corporations, or inferior courts of judicature within the king’s dominions, requiring them to do a certain specific act, as being the duty of their office, character or situation, agreeably to right and justice. This writ affords a proper remedy, in cases where the party has not any other means of compelling a specific performance. The object of the writ is not to supersede legal remedies, but only to supply the defect of them. The only proper ground of the writ is a defect of justice. It is, however, a prerogative writ, and not a writ of right, and it is the absence or want of a specific legal remedy, which gives the court jurisdiction. There must be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus. It is no objection, however, to the granting a mandamus to do a particular act, that an indictment will also lie for the omission to do the act. The power to issue the writ belongs exclusively to the court of king’s bench, and is considered as one of the flowers of that court; but this power ought to be exercised with great caution, as a writ of error does not lie on this proceeding. A mandamus lies either to restore a person wrongfully ousted or to admit a person wrongfully refused.”⁸

§ 495. **Jurisdiction of supreme court to issue the writ of mandamus regulated by statute.**—By the thirteenth section of the original judiciary act it was provided that the supreme court shall have power to issue “writs of mandamus in cases

⁷ 26 U. S. Stat. at L. ch. 517, secs. 5, 6, 7, p. 826; 2 Bates, Fed. Eq. Proc. secs. 793, 796, 797, 798, 806; *Re Huguley Mfg. Co.*, 184 U. S. 297 (46:594); *Ex parte New York & P. R. S. Co.*, 155 U. S. 523 (39:246).

⁸ 2 Selwyn’s *Nisi Prius* (1831) 261–262; *Bradley v. McCrabb*, *Dallam* (Texas), 504; *Kendall v. United States*, 12 Pet. 524–653 (9:1181); *Ex parte Crane*, 5 Pet. 190–223 (8:92).

warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States,"⁹ and in the revision the following words are added, namely: "Where a state, or an ambassador, or other public minister or consul or vice-consul is a party."¹⁰

§ 496. Same—Power of supreme court to issue writ in exercise of original jurisdiction limited by the constitution.—The jurisdiction of the supreme court, both original and appellate, is defined in the constitution, and the dividing line between the two kinds of jurisdiction is clearly and unmistakably fixed and established,¹¹ and it is not within the competency of congress to vest in that court the power to issue the writ of mandamus as an original proceeding except in those classes of cases particularly specified in the constitutional provision as falling within its original jurisdiction; and, therefore, it was accordingly held that the thirteenth section of the original judiciary act was ineffectual to vest in the supreme court power and jurisdiction to issue a writ of mandamus to the secretary of state of the United States to compel him to deliver to certain persons, named as applicants for the writ, their commissions as justices of the peace in the District of Columbia, they having been appointed to such offices by the President.¹²

§ 497. Writ of mandamus issued by the supreme court chiefly in aid of its appellate jurisdiction.—Ever since the decision of the case¹³ cited in the section next preceding, it has been a settled and fundamental rule of federal jurisprudence, that, except in the classes of cases over which the supreme court is by the constitution given original jurisdiction, that court can issue the writ of mandamus only in the exercise of or in aid of its appellate jurisdiction. The word "appellate" used in the constitution to define the jurisdiction of the supreme court was not employed in a restricted sense, but in the broadest sense, embracing appeals, writs of error, prohibition, *certiorari* and mandamus, as proper proceedings to be used for

⁹ 1 U. S. Stat. at L. ch. 20, sec. 13, pp. 73-79.

¹⁰ U. S. Rev. Stat. sec. 688, 4 Fed. Stat. Anno. 439, U. S. Comp. Stat. 1901, p. 565.

¹¹ U. S. Const. art. III. sec. 3, cl. 2.

¹² *Marbury v. Madison*, 1 Cranch, 137-180 (2:60).

¹³ *Marbury v. Madison*, 1 Cranch, 137-180 (2:60).

the purpose of supervising the inferior courts of the United States. At the time of the adoption of the federal constitution, the writ of mandamus was one of the principle methods used by the court of king's bench for the purpose of exercising its supervisory power over the inferior courts, and was adopted by the original judiciary act as one of the modes for the exercise of the appellate jurisdiction of the supreme court, the thirteenth section of the act expressly empowering that court to issue "writs of mandamus, in cases, warranted by the usages and principles of law, to any courts appointed * * * under the authority of the United States," and it appears by a long and unbroken line of decisions that the only practical use of the writ of mandamus by the United States supreme court is in the exercise of its appellate jurisdiction and supervisory power over the inferior courts of the United States.¹⁴

§ 498. **When the writ of mandamus will issue to inferior courts of the United States.**—The only office of the writ of mandamus, when issued from a superior to an inferior court, is to direct the performance of a ministerial act, or to command the court to act in a case or matter where it has jurisdiction and refuses to act. The supreme court has the power to issue the writ to inferior courts of the United States only "in cases warranted by the principles and usages of law,"¹⁵ and the rule is that those principles and usages warrant the issue of the writ when the inferior court, having jurisdiction of a case, refuses to hear and decide the controversy, or, having heard the case, refuses to render or enter a judgment or decree

¹⁴ *Virginia v. Rives*, 100 U. S. 313-338 (205:667); *Re Green*, 141 U. S. 325 (35:765); *Ex parte Crane*, 5 Pet. 200 (8:96); *Ex parte Newman*, 14 Wall. 165 (200:879); *Hudson v. Parker*, 156 U. S. 277 (39:424); *Ex parte Connaway*, 178 U. S. 421 (44:1134); *Re Grossmayer*, 177 U. S. 48 (44:665); *Re Potts*, 166 U. S. 263 (41:994); *Re Parker*, 131 U. S. 221 (33:123); *Re Parker*, 120 U. S. 737 (30:818); *Re Hohorst*, 150 U. S. 653 (37:1211); *Re Chateaugay Ore & Iron Co.'s Petition*, 128 U. S. 544 (32:508); *Gaines v. Caldwell*, 148 U. S.

228 (37:432); *Re City Nat. Bank*, 153 U. S. 246 (38:705); *Ex parte Schallenberger*, 96 U. S. 369 (24:853); *Ex parte Sawyer*, 21 Wall. 235 (22:617); *Ex parte Burtis*, 103 U. S. 238 (26:392); *United States v. Lawrence*, 3 Dall. 42 (1:502); *United States v. Peters*, 5 Cranch, 115 (3:53); *Kendall v. United States*, 12 Pet. 524 (9:1181); *Decatur v. Paulding*, 14 Pet. 497 (10:559); *United States v. Addison*, 22 How. 174 (16:304).

¹⁵ U. S. Rev. Stat. sec. 688, U. S. Comp. Stat. 1901, p. 565, 4 Fed. Stat. Anno. 439.

therein, or refuses to act on some matter connected with the case where such action is necessary to give effect to its judgment or is necessary for the submission of the case to the appellate court for review, or refuses to execute the mandate of the appellate court; but the principles and usages of law do not warrant the use of the writ of mandamus to review, revise or re-examine the judgment or decree of the inferior court, nor to prescribe what its decision shall be or direct what judgment or decree it shall enter in any pending case, nor to control the judgment or discretion of the court in disposing of the case, nor will the writ be issued in any case if the party aggrieved has a remedy by writ of error or appeal. The writ operates in aid of the appellate jurisdiction of the supreme court, by directing the inferior court to proceed, according to its own judgment, to a final determination, so that its judgment may be reviewed on writ of error or appeal.¹⁶

§ 499. Writ cannot issue in cases where the supreme court has neither original nor appellate jurisdiction.—The supreme court has no power to award a writ of mandamus in cases over which it possesses neither original nor appellate jurisdiction.¹⁷

§ 500. Writ cannot be used as a writ of error or appeal.—A writ of mandamus cannot be issued by the supreme court to perform the office of an appeal or writ of error, to review the judicial action of an inferior court of the United States; and, therefore, does not lie to review a final judgment or decree of the circuit court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law.¹⁸

§ 501. The writ cannot be issued to state courts.—The special authority given by the federal statute to the supreme court of the United States to issue writs of mandamus to the inferior federal courts has always been held to exclude the authority

¹⁶ *Ex parte Newman*, 14 Wall. 152 (20:877); *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291 (8:949); *United States v. Russell*, 13 Wall. 623 (20:474); *United States v. Peters*, 5 Cranch, 135 (3:58); *Ex parte Bradstreet*, 7 Pet. 648 (8:815); *Ex parte Many*, 14 How. 24 (14:311); *United States v. Lawrence*, 3 Dall. 42 (1:502); *Commissioners of Patents v.*

Whiteley, 4 Wall. 522 (18:335); *Life & Fire Ins. Co. v. Adams*, 9 Pet. 602 (9:244).

¹⁷ *Ex parte Gertrude Glaser*, 198 U. S. 171-173 (49:1000); *Re Massachusetts*, 197 U. S. 482 (49:845).

¹⁸ *American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372-378 (37:486).

to issue those writs to state courts and state officers, except where they are issued as process in the execution of judgments; and writ of error, and not mandamus, is the proper remedy to correct the action of the supreme court of a state in failing to give full effect to a mandate from the supreme court of the United States by mistaking or misconstruing its judgment.¹⁹

(c) THE WRIT OF CERTIORARI

§ 502. **Jurisdiction to issue the writ under the original judiciary act.**—Under the fourteenth section of the original judiciary act, preserved as section seven hundred and sixteen of the revised statutes, which gave to all the courts of the United States power to issue all “writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,” the supreme court has power to issue the writ of *certiorari* either (1) as an auxiliary process only, to supply imperfections in the record of a case already before it, and not as a writ of error to review the judgment of an inferior court,²⁰ or (2) as an original and independent writ, whenever the circumstances imperatively demand it, as at common law, to correct excesses of jurisdiction, and in furtherance of justice, as in the case of judgments in contempt proceedings in excess of the jurisdiction of the lower court, and which are not reviewable on appeal or writ of error, but may be reached by *certiorari* in the absence of any other adequate remedy.²¹

§ 503. **Same—Court cannot issue the writ when it has no jurisdiction over the case.**—In cases over which the supreme court possesses neither original nor appellate jurisdiction, it cannot issue the writ of *certiorari*, either as an ancillary or original process.²²

§ 504. **Same—Writ cannot issue to review proceedings of military tribunal.**—The supreme court has no power under the above mentioned legislation to review, by writ of *certiorari*,

¹⁹ Re Blake, 175 U. S. 114-120 (44:94).

²⁰ American Construction Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372-378 (37:486), and authorities cited.

²¹ Ex parte Chetwood, 165 U. S. 443-462 (41:782); Whitney v. Dick, 202 U. S. 132-141 (50:963).

²² Ex parte Massachusetts, 197 U. S. 482-488 (49:845).

the proceedings of military tribunals. Such tribunals possessing no jurisdiction of cases in law and equity within the meaning of the third article of the federal constitution, and the question of the issue of the writ of *certiorari* by the supreme court in the exercise of any inherent general power cannot arise in respect of them.²³

§ 505. Jurisdiction to issue the writ under the judiciary act of March 3, 1891.—By the sixth section of the judiciary act of March 3, 1891, the supreme court is given jurisdiction to issue the writ of *certiorari* to the United States circuit court of appeals, to remove a large class of cases for review and determination with the same power and authority in the case as if it had been carried to the supreme court by appeal or writ of error.²⁴

²³ *Re Vidal*, 179 U. S. 126-127 (45:118). 6, p. 826; *Kingman & Co. v. Western Manufacturing Co.*, 170 U. S.

²⁴ 26 U. S. Stat. at L. ch. 517, sec. 675-681 (42:1192).

CHAPTER XIII.

THE ADMIRALTY JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

(a) THE BASIS OF THE ADMIRALTY JURISDICTION OF THE FEDERAL JUDICIARY.

- § 506. Three great jurisdictions embraced within the judicial power of the United States.
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509. The general maritime law not in force in this country except so far as adopted.
510. The power of congress to legislate upon the subject of maritime law.
511. Legislative adoption of rule of general maritime law.
512. The maritime code of the United States.
513. Same—The limited liability act.
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517. The law of the high seas.
518. Same—Contracts of affreightment made in foreign countries.
- § 519. The judicial power extends to two classes of civil suits in admiralty.
520. In the adjudication of prizes, courts of admiralty are governed by the laws of nations.
521. Power of congress to make rules concerning prizes or maritime captures.
522. Seizure and condemnation of piratical vessels.
523. Forfeiture and condemnation of maritime captures not dependent upon criminal conviction in personam.
524. Rule defining the public navigable waters of the United States.
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526. Same—Navigable rivers flowing wholly within the territorial limits of one state.
527. Same—Same—Illustration—The Alabama river.
528. Same—Same—Same—The Yazoo river in the state of Mississippi.
529. Same—Same—Same—Grand river in the state of Michigan.
530. Same—Same—Same—Fox river in the state of Wisconsin.
531. Same—Canals.
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- diction not controlled by the power to regulate commerce.
- § 533. Same—What are navigable waters is a judicial question.
534. Rule defining navigable waters of the state.
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537. History of federal legislation vesting admiralty jurisdiction—Ninth section of the original judiciary act.
538. Same—Same—Seizures upon water.
539. Same—Act of Feb. 26, 1845—Founded in judicial mistake.
540. Same—Same—Same—Obsolete legislation.
541. The state courts have no admiralty jurisdiction.
542. Same—The states may create maritime liens, but cannot confer on their own courts admiralty jurisdiction to enforce them.
543. Same—Same—State cannot create lien on foreign vessel.
544. Contract and tort the sources of admiralty jurisdiction—Exceptions.
545. Maritime contracts.
546. Same—Contracts not maritime—Building ship.
547. Same—Same—Mortgage of vessel.
548. Same—Same—Same—Mortgage not made maritime contract by the registry act.
- § 549. Marine torts.
- 549a. Maritime liens—Defined.
- 549b. Same—Difference between maritime lien and common law lien.
550. Same—The subjects of maritime liens.
551. Same—A maritime lien is a present right of property.
552. Same—Maritime liens arise out of both contract and tort.
553. Same—When lien is created.
554. Same—Priority of maritime liens.
555. Same—Same—Lien arising out of collision takes precedence over antecedent lien for supplies.
556. Same—Same—Maritime lien for supplies takes precedence over prior mortgage.
557. Forms of actions or suits in admiralty.
558. Same—Jurisdiction in rem based on maritime lien.
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- (b) THE EXCLUSIVE ORIGINAL JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES IN ADMIRALTY AND MARITIME CAUSES.
560. Jurisdiction of civil causes in admiralty.
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562. Suits based on marine torts.
563. Same—Immaterial that the tort is committed within the waters of a foreign country.
564. Same—To enforce maritime liens.
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| <p>§ 566. Jurisdiction of suits by materialmen.</p> <p>567. Jurisdiction of suits by seamen for wages.</p> <p>568. Same—Wages not dependent on freight.</p> <p>569. Jurisdiction of suits by master for his wages.</p> <p>570. Towage contracts.</p> <p>571. Jurisdiction of suits to recover compensation for pilotage.</p> <p>572. Same—State laws regulating pilotage constitutional.</p> <p>573. Jurisdiction of suits for salvage.</p> <p>574. Same—Libel for salvage against the United States.</p> <p>575. General average contribution.</p> <p>576. Jurisdiction of suits on policies of marine insurance.</p> <p>577. Jurisdiction of suits on maritime hypothecation.</p> <p>578. Same—Bottomry Bonds Defined.</p> <p>579. Same—Respondentia bonds.</p> <p>580. Jurisdiction of suits on affreightment contracts.</p> <p>580a. Jurisdiction of suits on contracts for the transportation of persons.</p> <p>581. Jurisdiction of suits based on charter-party.</p> <p>582. Demurrage.</p> <p>583. Stevedores.</p> <p>584. Wharfage.</p> <p>585. Lighterage.</p> <p>586. Consortship.</p> <p>587. Jurisdiction of pettitory and possessory suits.</p> | <p>§ 588. Jurisdiction of suits for damages by collision.</p> <p>589. Same—Collision <i>infra corpus comitatus</i>.</p> <p>590. Same—Venue of suits for damages by collision.</p> <p>591. Same—Concurrent common law remedy for damages by collision.</p> <p>592. Jurisdiction of suits for damages to vessels caused by obstructions negligently left in navigable waters.</p> <p>593. Jurisdiction of libel in rem against vessel for negligent destruction of beacon.</p> <p>594. Jurisdiction of suits for assault and battery.</p> <p>595. Action for marine tort resulting in death.</p> <p>596. Same—Jurisdiction in admiralty under state statutes.</p> <p>597. Jurisdiction of suits under the limited liability act.</p> <p>598. Jurisdiction of maritime seizures.</p> <p>599. Same—Seizure necessary to vest jurisdiction.</p> <p>600. Same—Venue of suits to forfeit and condemn seizures.</p> <p>601. Jurisdiction of suits for the restitution of vessels illegally seized.</p> <p>602. Jurisdiction of prize <i>jure belli</i>.</p> <p>603. Venue of suits in admiralty.</p> <p>604. Same—Interventions.</p> |
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(a) THE BASIS OF THE ADMIRALTY JURISDICTION OF THE FEDERAL JUDICIARY.

§ 506. Three great jurisdictions embraced within the judicial power of the United States.—The judicial power of the United States, granted and defined by the federal constitution,

extends to and embraces three great classes of judicial controversies, which were clearly defined and distinguished in the judiciary of England and her colonies at the time of the establishment of our government, namely: (1) actions at common law, (2) suits in equity, and (3) suits in admiralty. And the constitutional grant of judicial power, by necessary implication, recognized the existence of three great, distinct systems of law and jurisprudence, namely: (1) the body of rules and principles of the English common law, which the English people had, by the methods of legal induction and judicial evolution, developed and established, and whose principles formed the municipal jurisprudence of England and the palladium of English liberties, and were brought to this country by the colonies and formed the basis of the jurisprudence of the several states; and (2) the system of English equity jurisprudence, which had been developed and administered by the high court of chancery in England, and which has also become a part of the jurisprudence of the several states; and (3) the system of maritime law which had been developed and matured by the most enlightened and commercial nations of the world, and which had been established and existed for centuries before the birth of this nation, and which, at the time of our revolution, was administered by the admiralty courts of continental Europe, the high court of admiralty in England, and by the vice admirals under special commission in the colonies.¹

¹ U. S. Const. art. III, sec. 2; 1 U. S. Stat. at L. ch. 20, secs. 9, 11, pp. 73, 77; *Jackson v. Magnolia*, 20 How. 296 (15:909); *The Belfast v. Boon*, 7 Wall. 624 (19:267); *Sears v. Wills*, 1 Black, 108, 115 (17:35); *Waring v. Clark*, 5 How. 441 (12:226); *The Lottawana*, 21 Wall. 558, 609 (22:654); *The St. Lawrence*, 1 Black, 526, 527 (17:183); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017); *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776.

In *The Lottawana*, *supra*, Bradley, Justice, delivering the opinion of the court, said:

"That we have a maritime law

of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The constitution does not define it. It does not declare whether it was intended to embrace the entire

§ 507. The question as to the limits of the judicial power in admiralty and maritime jurisdiction is a judicial question.—The constitution delegated to the federal government judicial power in all cases of admiralty and maritime jurisdiction, without, however, precisely fixing the definite boundaries of that power; and the question as to the true limits and definite boundaries of the power is exclusively a judicial question, to be determined, in the last resort, by the federal supreme court, as the cases calling for it may arise, by a reasonable construction of the words of the constitution containing the grant of the power, taken in connection with the whole instrument, and the purposes for which the power was granted to the federal government, and a consideration of the constitutional history of this country and the principles worked out by previous adjudications of the court upon the subject, and the actual conditions affecting navigation and the necessities of maritime enterprises and interests. No law enacted by a state, or by the congress of the United States can increase or diminish the judicial power vested by the constitution in the federal government in cases of admiralty and maritime jurisdiction.²

maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase, 'admiralty and maritime jurisdiction,' is well understood. It treats this matter as the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood."

² The *Genesee Chief*, 12 How. 443, 465 (13:1058); The *St. Law-*

rence, 1 Black, 522, 532 (17:180); The *Lottawana*, 21 Wall. 558, 609 (22:654); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017); The *Blackheath*, 195 U. S. 361, 369 (49:236).

In the *St. Lawrence*, *supra*, Chief Justice Taney, delivering the opinion of the court, while discussing the distinction between the power of a court upon a question of jurisdiction, and its authority over its forms of procedure, said:

"Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided

§ 508. **Same—Judicial tendency to enlarge the jurisdiction.** There has been a uniform and unbroken judicial tendency to enlarge and extend, by constitutional construction, the judicial power of the federal government over admiralty and maritime causes, in order to meet the needs and requirements of the growing commerce of the country, in so far as that commerce is affected by navigation and maritime transactions and their aids and incidents.³ This policy of extension may be said to have begun with the opinion ⁴ of Chief Justice Taney, rendered in 1851, overruling a decision ⁵ rendered in 1825, by Justice Story, holding that the jurisdiction of the courts of admiralty of the United States, was limited to the ebb and flow of the tide. The opinion of Chief Justice Taney established the modern doctrine, which has since been invariably adhered to and followed, that “not the ebb and flow of the tide, but the actual navigability of the water, is the test of jurisdiction,” in all admiralty and maritime cases depending upon locality.⁶ The common law principle of flexibility, which enabled the English courts to apply the principles of the common law to the expanding necessities of civilization, has been applied by the

to them; the extent of the jurisdiction conferred depending very much upon the character of government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States.

“This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no

state law can enlarge it, nor can an act of congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government.”

³ *The Blackheath*, 195 U. S. 361, 369 (49:236).

⁴ *The Genesee Chief*, 12 How. 443 (13:1058).

⁵ *The Thomas Jefferson*, 10 Wheat. 428 (6:358).

⁶ *Fretz v. Bull*, 12 How. 466 (13:1068); *The Magnolia*, 20 How. 296 (15:909); *The Daniel Ball*, 10 Wall. 557 (19:999).

federal courts to admiralty and maritime causes and transactions.⁷

§ 509. **The general maritime law not in force in this country except so far as adopted.**—The general maritime law is in force in this country, and constitutes a part of its maritime code, so far only as received and accepted and administered in the federal courts or adopted by the laws and usages of the United States;⁸ and the maritime usages of foreign countries are not obligatory upon the federal judiciary, and will not be respected as authority by it, except so far as they are consonant with the well-settled principles of English and American jurisprudence.⁹ Whilst it is true that the general maritime law constitutes the basis and ground-work of the maritime code of the United States, yet it is also true that it is operative in this country in so far only as it has been received and accepted and adopted in some appropriate and authoritative manner.¹⁰

⁷ *The Genesee Chief*, 12 How. 443 (13:1058).

⁸ *The John G. Stephens*, 170 U. S. 113, 127 (42:969); *The Lottawana*, 21 Wall. 558, 572 (22:654); *The Belgenland*, 114 U. S. 355, 369 (29:152); *Liverpool & G. W. Steam. Co. v. Phoenix Ins. Co.*, 129 U. S. 397 (32:788); *Ralli v. Troop*, 157 U. S. 386 (39:742); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017).

⁹ *The Elfreda*, 172 U. S. 186, 206 (43:413).

¹⁰ *The Lottawana*, 21 Wall. 558, 572 (22:654); *The Scotland*, 105 U. S. 24, 36 (26:1001).

In *The Lottawana*, *supra*, Bradley, Justice, delivering the opinion of the court, discussing the claim of materialmen to a maritime lien on the vessel, for needful repairs and supplies furnished upon her credit in the home port, which was sought to be upheld under the general maritime law, said:

"The ground on which we are asked to overrule the judgment in

the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well as when furnished in her home port as when furnished in a foreign port, and the courts of admiralty are bound to give effect to that lien. The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

"But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the

§ 510. The power of congress to legislate upon the subject of maritime law.—Whilst it is true that the question as to the definite boundaries of the judicial power of the United States in admiralty and maritime cases is exclusively a judicial question, and congress can neither restrict nor extend those boun-

force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this union also presents an analogous case. It is the basis of all the state laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one

doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence, the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that, whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent

daries as defined by the judiciary,¹¹ yet, it is also true that, within those boundaries as so declared and defined, congress has ample power to legislate upon maritime subjects; and its enactments, when so guarded and limited, and not in conflict with any provision of the federal constitution, are a part of the maritime law of the country, and, being a part of the maritime law, their operation is territorially coextensive with the admiralty and maritime jurisdiction of the national government, which, by the settled law of the country extends wherever public navigation extends—on the seas and the great lakes, and all the navigable rivers and other navigable waters connected with the lakes and the sea.¹²

§ 511. **Legislative adoption of rule of general maritime law.** Where congress, by legislative enactment, adopts a rule of the general maritime law, the force and authority of the rule so

or inherent force, *proprio vigore*, but as its own law with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

"This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at

her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view of the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes.

"This view of the subject does not in the slightest degree detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and with proper qualifications, received with the binding force of law in all countries."

¹¹ Ante, sec. 507, and authorities there cited.

¹² *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017); *The City of Norwalk*, 55 Fed. 105; *The*

adopted depend upon the federal statute, and not upon any inherent force of the general maritime law.¹³

§ 512. **The maritime code of the United States.**—The constituent elements of the maritime code of the United States are: (1) The rules, principles and doctrines of the general maritime law which have been, in some authoritative mode, received, accepted and adopted in this country as a part of its maritime system, and (2) the laws enacted by congress as a part of the maritime law, and which are within the limits of the judicial power of the United States in cases of admiralty and maritime jurisdiction, as the limits of that power has been defined by the judicial power of the government.¹⁴

§ 513. **Same—The limited liability act.**—The legislation of congress known as the “Limited Liability Act,”¹⁵ and amendments¹⁶ thereto, limiting the liability of ship owners in certain specified cases, constitute a part of the maritime law of this country, and are, in their operation, coextensive with public navigation, and cases arising under them are within the admiralty and maritime jurisdiction of the courts of the United States.¹⁷

Scotland, 105 U. S. 24, 36 (26:1001); *Ex parte Garnett*, 141 U. S. 1, 18 (35:631).

¹³ *Ex parte Garnett*, 141 U. S. 1, 18 (35:631); *The Scotland*, 105 U. S. 24, 36 (26:1001).

¹⁴ *The Lottawana*, 21 Wall. 558, 609 (22:654); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017); *Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104, 127 (20:585); *The Scotland*, 105 U. S. 24, 36 (26:1001); *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 593 (27:1038); *Ex parte Garnett*, 141 U. S. 1, 18 (35:631).

¹⁵ U. S. Rev. Stat. secs. 4281–4289, 4 Fed. Stat. Anno. 837–852.

¹⁶ 23 U. S. Stat. at L. ch. 121, sec. 18, p. 57, 4 Fed. Stat. Anno. 852; 24 U. S. Stat. at L. ch. 421, sec. 4, pp. 80, 81, 4 Fed. Stat. Anno. 852.

¹⁷ *Ex parte Garnett*, 141 U. S. 1, 18 (35:631); *Norwich & N. Y.*

Trans. Co. v. Wright, 13 Wall. 104, 127 (20:585); *The Lottawana*, 21 Wall. 558, 577 (22:654); *The Scotland*, 105 U. S. 24, 36 (26:1001); *The Benefactor*, 103 U. S. 239, 250 (26:351); *The Great Western*, 118 U. S. 520 (30:156); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017).

In *Butler v. Steamship Co.*, which presented the question whether the limited liability act applied to cases of personal injury and death, which was decided in the affirmative in that case, Mr. Justice Bradley, delivering the opinion of the court, said:

“One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this.

§ 514. **Same—The Harter Act.**—The Harter Act,¹⁸ regulating contracts of affreightment entered into by the owners of vessels transporting merchandise,¹⁹ constitutes a part of the maritime laws of this country, and will be applied to foreign vessels in suits brought in the United States.²⁰

§ 515. **Same—Legislation of congress in regard to seamen.**—One of the most important statutory features of the maritime code of this country is to be found in the extensive and judicious legislation of congress in regard to seamen, covering the entire field of their rights, duties and liabilities, and establishing all needful rules and regulations for their protection both at home and abroad.²¹

§ 516. **Federal legislation forfeiting vessels fitted out with intent to violate neutrality.**—The provision of the federal statute²² forfeiting vessels fitted out in the United States with intent to violate the neutral and pacific relations of this country

As the constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held that the boundaries, and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be effected or controlled by legislation, whether state or national. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as congress may from time to time have adopted.

"It being clear, then, that the law of limited liability of ship owners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is neces-

sarily coextensive with that of the general admiralty and maritime jurisdiction, and that, by the settled law of this country, extends wherever public navigation extends—on the sea and the great inland lakes, and the navigable waters connecting therewith."

¹⁸ 27 U. S. Stat. at L. ch. 105, p. 445, 4 Fed. Stat. Anno. 854-857.

¹⁹ *The Delaware*, 161 U. S. 459, 474 (40:771).

²⁰ *The Germanic*, 196 U. S. 589, 599 (49:610); *The Chattahoochee*, 173 U. S. 540 (43:801).

²¹ U. S. Rev. Stat. secs. 4501-4612; 18 U. S. Stat. at L. ch. 260, p. 64; 23 U. S. Stat. at L. ch. 121, pp. 53-60; 24 U. S. Stat. at L. ch. 421, pp. 79-83; 26 U. S. Stat. at L. ch. 801, p. 320; 28 U. S. Stat. at L. ch. 97, p. 667; 29 U. S. Stat. at L. ch. 389, pp. 687-692; 30 U. S. Stat. at L. ch. 28, pp. 756-764; 3 U. S. Comp. Stat. 1901, pp. 3061-3125; 6 Fed. Stat. Anno. 843-935.

²² U. S. Rev. Stat. sec. 5283; 3 U. S. Comp. Stat. 1901, pp. 3599, 3600; 5 Fed. Stat. Anno. 358-365.

with foreign nations, is a part of the maritime code and is enforced by civil suit *in rem* on the instance side of the courts of admiralty, independently of any criminal conviction *in personam*.²³

§ 517. **The law of the high seas.**—The courts of every country will administer justice according to its own laws, unless a different law be shown to apply; and this rule applies to transactions taking place on the high seas. If a collision occur on the high seas, where the law of no particular state or country has exclusive force, but all are equal, any forum called upon to settle the rights, and to determine the controversies arising therefrom, would, *prima facie*, determine them by its own laws as presumptively expressing the rules of justice; but if the contesting vessels belong to the same foreign nation, the court will assume that they were subject to the law of their nation, carried under their common flag, and would determine their controversy accordingly. But if they belong to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws; and it will do this without respect to persons, to the stranger as well as to the citizen.²⁴ The law of the sea is of universal obligation, and no single nation can change it. No statute of one or two states can create obligations for the world. Like all the laws of nations, the law of the sea rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. And the rules of navigation mentioned in the British orders in council of January 9, 1863, and in the Act of congress of the United States of 1864, having been accepted

²³ United States v. The Three Friends, 166 U. S. 1-83 (41:897). sen, 114 U. S. 355, 373 (29:152); Liverpool and Great Western

²⁴ The Scotland, 105 U. S. 24, 36 Steam Co. v. Ins. Co., 129 U. S. 397-464 (32:788).
(26:1001); The Belgenland v. Jen-

as obligatory rules by more than thirty of the principal commercial states of the world, they are regarded as part, at least, of the law of the sea, and of that fact the courts of this country will take judicial notice.²⁵

§ 518. **Same—Contracts of affreightment made in foreign countries.**—The general rule of law, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, applies to maritime shipments, and requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country,²⁶ but the courts of one country cannot take cognizance of the law of another without plea and proof,²⁷ and, in a suit in the admiralty courts of the United States upon a maritime contract of affreightment made in a foreign country to be governed by its laws, the parties, if they desire the application of those laws, must allege and prove them as a fact.²⁸

§ 519. **The judicial power extends to two classes of civil suits in admiralty.**—The judicial power of the United States extends to and embraces two great classes of civil suits in admiralty, namely: (1) Suits arising under the maritime law and which are by that law cognizable in the instance court of admiralty, and (2) prize cases, or cases arising out of captures *jure belli*, and which are cognizable in the prize court of admiralty. In England these are different courts, and although the jurisdiction of each of them is always exercised by the same person, yet he holds the offices by different commissions. But, under the constitution of the United States, the instance

²⁵ *The Scotia*, 14 Wall. 170, 189 (20:822); *The Belgenland v. Jensen*, 114 U. S. 355, 373 (29:152); U. S. Rev. Stat. sec. 4233; 2 Fed. Stat. Anno. 183-201, where the cases are collected.

²⁶ *Liverpool and Great Western Steam Co. v. Ins. Co.*, 129 U. S. 397-464 (32:788).

²⁷ *Liverpool and Great Western*

Steam Co. v. Ins. Co., 129 U. S. 397-464 (32:788); *Church v. Hubbard*, 2 Cranch. 187-236 (2:249); *Ennis v. Smith*, 14 How. 426, 427 (14:472); *Pierce v. Indseth*, 106 U. S. 546 (27:254).

²⁸ *Liverpool and Great Western Steam Co. v. Ins. Co.*, 129 U. S. 397-464 (32:788); *The Scotland*, 105 U. S. 24, 36 (26:1001).

court of admiralty and the prize court of admiralty are the same court, acting under one commission, still embracing two distinct jurisdictions, and the proceedings in the two classes of cases are different. When a case has been prosecuted as a prize cause in the modes in use in the prize courts, and the facts, when developed, show it not to be prize, but a case for forfeiture under the federal statutes, no judgment of forfeiture can be rendered without amending the proceedings so as to conform to the requisites of the procedure on the instance side of the court; and in like manner, when a case has been prosecuted on the instance side, and the facts, when developed, show it to be a case of prize, there can be no condemnation of the property as prize without first amending the proceedings so as to conform to the modes of procedure in prize courts; and upon appeal in such cases, the appellate court will reverse and remand for the purposes of amendment and further proceedings.²⁹

§ 520. In the adjudication of prize, courts of admiralty are governed by the law of nations.—In the maritime law, the word prize means a legal maritime capture *jure belli*; there can be no prize unless there be existing an actual state of war. “The right of prize and capture has its origin in the ‘*jus belli*,’ and is governed and adjudged under the laws of nations.” The right of maritime capture is defined by the laws of nations; and, therefore, in adjudicating upon the question of prize or no prize, courts of admiralty are controlled by the rules and principles of international law, and not by the municipal or local laws of any state or nation.³⁰

§ 521. Power of congress to make rules concerning prizes or maritime captures.—Although congress has no power to either restrict or extend the limits of the judicial power of the United States over causes of admiralty and maritime jurisdic-

²⁹ *Jecker v. Montgomery*, 13 How. 498-518 (14:240); *S. C.* 18 How. 110-126 (15:311); *United States v. Weed*, 5 Wall. 62, 74 (18:531); *Prize Cases*, 2 Black, 635, 699 (17:459); *The Adeline*, 9 Cranch, 244; *Glass v. The Betsey*, 3 Dall. 6 (1:485).

³⁰ *Prize Cases*, 2 Black. 635 (17:

459); *United States v. The Watchful*, 6 Wall. 91, 93 (18:763); *United States v. Weed*, 5 Wall. 62, 74 (18:531); *Jecker v. Montgomery*, 13 Wall. 498 (14:240); *The City of Mexico*, 28 Fed. 148, 150; *Jecker v. Montgomery*, 18 How. 110 (15:311).

tion,³¹ yet it has power to make rules concerning maritime captures. The federal constitution confers upon congress the power: "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."³² The power granted by this constitutional provision to make rules concerning captures is an independent substantive power, not included in that of declaring war,³³ and in the exercise of that power, congress has made and established a complete code of rules for the adjudication and disposition of maritime captures, and the procedure to be followed in such cases.³⁴

§ 522. **Seizure and condemnation of piratical vessels.**—The judicial power of the United States in maritime causes extends to and embraces proceedings for the condemnation of piratical vessels, seized and sent in for adjudication under the legislation of congress "to protect the commerce of the United States and punish the crime of piracy." Such proceedings are civil proceedings *in rem*, independent of and wholly unaffected by any criminal proceedings *in personam*, the ship being held responsible for the misconduct, torts and crimes of the master and crew, without regard to the ignorance or innocence of the owners.³⁵ This legislation forms a part of the maritime code of the United States.³⁶

§ 523. **Forfeitures and condemnation of maritime captures not dependent upon criminal conviction in personam.**—It is a principle of federal legislation, derived from the general maritime law, that the condemnation of a vessel seized for a violation of the maritime code, and sent in for adjudication, is not dependent upon a criminal conviction *in personam* of the master, crew, or owners of the vessel, of the torts and crimes or vio-

³¹ The *Genesee Chief*, 12 How. 443, 465 (13:1058); The *St. Lawrence*, 1 Black, 522, 532 (17:180); The *Lottawana*, 21 Wall. 558, 609 (22:654); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017); The *Blackheath*, 195 U. S. 361, 369 (49:236).

³² U. S. Const. art. I, sec. 8, cl. 11.

³³ *Brown v. United States*, 8 Cranch, 110, 129 (3:504).

³⁴ U. S. Rev. Stat. secs. 4613-4652; 3 U. S. Comp. Stat. 1901, pp.

3126-3139; 6 Fed. Stat. Anno. 66-87; U. S. Rev. Stat. secs. 4752, 4759, 4760, 5441; 18 U. S. Stat. at L. ch. 256, p. 63.

³⁵ *United States v. The Malek Adhel*, 2 How. 210 (11:239); The *Mariana Flora*, 11 Wheat. 1 (6:531); The *Palmyra*, 12 Wheat. 1 (6:531).

³⁶ U. S. Rev. Stat. secs. 4293-4299; 5 Fed. Stat. Anno. 752-755; 3 U. S. Comp. Stat. 1901, pp. 2950-2952.

lations of the code which subject the vessel to forfeiture and condemnation. The proceeding to condemn is a civil proceeding *in rem*, for the condemnation of the vessel only, in which all the facts which establish the forfeiture may be alleged and proved wholly independent of and without regard to any criminal prosecution or conviction *in personam* of the persons whose violations of the maritime code of the country have worked a forfeiture of the vessel. The suit to condemn is a civil suit *in rem*, and not a criminal prosecution. Indeed, in such cases, forfeiture may be decreed if the proof should show the commission of the prohibited acts, although failing to show the identity of the particular persons by whom they were committed. The civil suit for condemnation and the criminal prosecution of the persons charged with the violation of the law are wholly independent and are pursued in different courts, and the result in the two cases may be different.³⁷

§ 524. Rule defining the public navigable waters of the United States.—The common-law rule which made the ebb and flow of the tide the test of navigability and admiralty jurisdiction in England was based upon the physical fact that, in that country, there are no waters navigable in fact which are not also subject to the flow and reflow of the tide; there, the limit of the tide is also the limit of navigability in fact, and the rule as applied to the actual physical conditions in England is not only a rational one, but the only one that could be applied.³⁸

The common-law rule as to the test of navigability and admiralty jurisdiction was adopted in this country by the supreme court in an early decision³⁹ and followed for twenty-five years, when the court, having pressed upon its attention the inapplicability of the rule to the actual physical conditions in this country, and seeing that a continuation of it would necessarily produce great public inconvenience, and frustrate the purpose of the framers of the constitution to secure perfect equality in the rights and privileges of the citizens of the dif-

³⁷ United States v. The Three Friends, 166 U. S. 1-83 (41:897); The Palmyra, 12 Wheat. 1 (6:531); The Ambrose Light, 25 Fed. 408; The Meteor, 17 Fed. Cases, 178; The United States v. The Malek Adhel, 2 How. 210 (11:239).

³⁸ Escanaba and Lake Michigan Transp. Company v. Chicago, 107 U. S. 678, 691 (27:442); The Genesee Chief, 12 How. 443 (13:1058).

³⁹ The Thomas Jefferson, 10 Wheat. 426 (6:358) (decided in 1825).

ferent states, by denying to the states on the great lakes and those traversed by the great navigable rivers of the west the benefits of the maritime law and courts of admiralty, "flatly overruled" its former decision, and repudiated the common-law rule, and established the modern doctrine that, not the ebb and flow of the tide, but the actual navigability of the waters is the test of admiralty jurisdiction,⁴⁰ and to which doctrine the court has consistently and invariably adhered ever since.⁴¹

⁴⁰ *The Genesee Chief*, 12 How. 443 (13:1058); in this case, which arose out of a collision on Lake Ontario about forty miles below Niagara, Chief Justice Taney, delivering the opinion of the court and giving its reasons for overruling its former decision and abandoning the common law test as to admiralty jurisdiction, said:

"These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other.

"Again, the union is formed upon the basis of equal rights among all the states. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of

controversies, but also to administer the laws of nations in seasons of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the union was formed to confine these rights to the states bordering on the Atlantic, and to the tide water rivers connected with it, and to deny them to the citizens who border on the great lakes, and the great navigable streams which flow through the western states. Certainly such was not the intention of the framers of the constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the constitution; that is, a perfect equality in the rights and privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the west are denied the benefits of the same courts and the same jurisdiction for its protection which the constitution secures to the states bordering on the Atlantic.

"The only objection made to

And now, by the settled decisions of the supreme court, the public navigable waters of the United States, within the meaning of the constitutional grant of the admiralty and maritime jurisdiction, in contradistinction from the navigable waters of the states, are defined to be those creeks, rivers, inlets, bays, ports, harbors, havens, lakes and other waters, which are navigable in fact, and which in their ordinary condition by themselves, or by uniting with other waters, form a continuous highway over which commerce is, or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water.⁴²

§ 525. **Same—Portage and artificial improvements.**—The character of the public navigable rivers of the United States is not affected by the fact that the navigability of the river is interrupted by rapids and falls over which portages are re-

this jurisdiction is that there is no tide in the lakes or waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the constitution was adopted, was confined to the ebb and flow of the tide.

"Now, there is certainly nothing in the ebb and flow of the tide that makes the water peculiarly suitable for the admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

⁴¹ *Fretz v. Bull*, 12 How. 466 (13:1068); *The Magnolia*, 20 How. 296 (15:909); *Nelson v. Leland*, 22

How. 48 (16:269); *The Propeller Commerce*, 1 Black, 574 (17:107); *The Hine v. Trevor*, 4 Wall. 555 (18:451); *The Belfast*, 7 Wall. 624 (19:266); *The Eagle*, 8 Wall. 15 (19:365); *The Daniel Ball*, 10 Wall. 557 (19:999); *The Montello*, 20 Wall. 430 (22:319); *Ex parte Boyer*, 109 U. S. 629 (27:1056); *Ex parte Garnett*, 141 U. S. 1-18 (35:631); *Perry v. Haines*, 191 U. S. 17-55 (48:73).

⁴² *The Genesee Chief*, 12 How. 443 (13:1058); *Fretz v. Bull*, 12 How. 466 (13:1068); *The Magnolia*, 20 How. 296 (15:909); *Nelson v. Leland*, 22 How. 48 (16:296); *The Propeller Commerce*, 1 Black, 574 (17:107); *The Belfast*, 7 Wall. 624 (19:266); *The Eagle*, 8 Wall. 15 (19:365); *The Daniel Ball*, 10 Wall. 557 (19:999); *The Montello*, 20 Wall. 430 (22:391); *Ex parte Boyer*, 109 U. S. 629 (27:1056); *Ex parte Garnett*, 141 U. S. 1-18 (35:631); *Perry v. Haines*, 191 U. S. 17-55 (48:73).

quired to be made, nor by the fact that the river may have been made navigable by artificial improvements.⁴³

§ 526. **Same—Navigable river flowing wholly within the territorial limits of one state.**—A river flowing wholly within the territorial limits of one state, and which is navigable in fact, and, by its connection or junction with other waters, forms a part of a continuous highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water, is a public navigable river of the United States, and is subject to the admiralty and maritime jurisdiction vested in the general government by the federal constitution; ⁴⁴ and that jurisdiction embraces marine torts committed, and marine contracts performed or to be performed upon such river in a voyage or voyages wholly between ports and places within the state in which the river flows, the admiralty jurisdiction being wholly independent of the power of congress to regulate interstate and foreign commerce.⁴⁵

§ 527. **Same—Same—Illustrations—The Alabama river.**—The Alabama river, which flows wholly within the state of Alabama, falls into the Mobile river fifty miles above tide water, is navigable from the sea, and is, therefore, a public navigable river of the United States, and subject to the admiralty and maritime jurisdiction of the national judiciary.⁴⁶ The case cited was a marine tort—a collision between two steamboats—on the river in the county of Wilcox in that state. A libel was filed by the owner of the boat which was injured in the district court of the United States for the middle district of Alabama to recover damages resulting from the collision. The respondents objected to the jurisdiction of the court upon two grounds, viz.: (1) That the collision occurred within the body of a county, and (2) it occurred above tide water. The objection to the jurisdiction was sustained by the court and the libel

⁴³ The *Montello*, 20 Wall. 430 (22:391); *Green Bay & Mississippi Canal Company v. Patten Paper Company*, 172 U. S. 58, 82 (43:364).

⁴⁴ The *Magnolia*, 20 How. 296 (15:909); *Nelson v. Leland*, 22 How. 48 (16:269); The *Daniel*

Ball, 10 Wall. 557 (19:999); The *Montello*, 20 Wall. 430 (22:391).

⁴⁵ The *Belfast*, 7 Wall. 624 (19:266); *The Propeller Commerce*, 1 Black, 574 (17:107).

⁴⁶ The *Magnolia*, 20 How. 296 (15:909).

dismissed, but the reason of its judgment was not disclosed; but upon appeal the supreme court reversed the decree of the lower court and upheld the jurisdiction, and pointed out the fact that both questions raised by the respondent had been foreclosed by the previous adjudications of the court, and laid down the proposition that the ninth section of the original judiciary act vested in the district courts of the United States admiralty and maritime jurisdiction over the navigable rivers of the United States, and that no further legislation was necessary after the decision in the *Genesee Chief* to complete that jurisdiction in those courts.⁴⁷

§ 528. Same—Same—Same—The Yazoo river in the state of Mississippi.—The Yazoo river which flows wholly within the state of Mississippi, falling into the Mississippi river twelve miles above Vicksburg, forms a part of a continuous highway, upon which commerce may be carried on between that state and other states and foreign countries, and is a public navigable river subject to the admiralty jurisdiction.⁴⁸ In the case cited, decided by the supreme court of the United States, in the year 1860, it was held that a collision occurring on the Yazoo river between a flat boat laden with cotton bales destined to New Orleans, Louisiana, while descending the river, and a steamboat ascending it, in which the former was wrecked and its cargo greatly damaged and a part of it lost, was a marine tort, justiciable in the district court of the United States for the eastern district of Louisiana, sitting in admiralty, upon a libel *in rem* there filed, the offending steamboat having been found and arrested in that district.⁴⁹

⁴⁷ *Magnolia*, supra, citing *Waring v. Clark*, 5 How. 441 as having decided that the admiralty courts have jurisdiction over torts committed on navigable waters within the body of a county, and the *Genesee Chief* to the point that the ebb and flow of the tide is not the test of admiralty jurisdiction in this country.

⁴⁸ *Nelson v. Leland*, 22 How. 48 (16:269).

⁴⁹ *Nelson v. Leland*, supra.

This case was cited with approval by the U. S. supreme court

as late as 1891 in *Ex Parte Garnett*, 141 U. S. 1-18 (35:631). It has been cited with approval in the following cases also: *The Sarah Jane*, 1 Low. 204, Fed. Cas. 12,349; *Walters v. Mollie Dozier*, 24 Iowa, 197, S. C. 95 Am. Dec. 725; *Smith v. United States*, 1 Wash. Ter. 268; *Steamboat Cheeseman v. Two Ferry-Boats*, 2 Bond, 373, Fed. Cas. 2,633; *The Propeller Commerce*, 1 Black, 581 (17:110); *The Maggie Hammond*, 9 Wall. 457 (19:780).

§ 529. ~~Same—Same—Same—~~Grand river in the state of Michigan.—Grand river flows wholly within the territorial limits of the state of Michigan, falling into Lake Michigan at Grand Haven, and is navigable in fact, capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth, and by its junction with the lake it forms a continued highway for commerce, both with other states and foreign countries; and in a leading case it was held that this river is a public navigable river of the United States, subject to the admiralty jurisdiction, and that a steamer in its navigation, between the cities of Grand Rapids and Grand Haven, and in the transportation of passengers and merchandise, a portion of the merchandise transported being destined to places in other states or coming from places without the state, but the steamer not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another state, was subject to the laws of the United States with regard to enrollment, license and inspection of vessels, and liable to be proceeded against in admiralty for a failure to comply with such laws.⁵⁰

⁵⁰ The Daniel Ball, 10 Wall. 557, 566 (19:999).

The language in the opinion in the case here cited, more clearly and lucidly, perhaps, defines the navigable waters of the United States, than the language of any other opinion of the court. Field, Justice, delivering the opinion of the court said:

“The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all as to the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navi-

gable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. * * * A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as

§ 530. **Same—Same—Same—Fox river in the state of Wisconsin.**—The Fox river, whose flow is wholly within the territorial limits of the state of Wisconsin, has its source near Portage city, Wisconsin, and flows in a northeasterly direction, through Lake Winnebago into Green Bay, and thence into Lake Michigan. By means of a canal of a mile and a half in length, it is connected at Portage city with the Wisconsin river, which empties into the Mississippi. There are several rapids and falls in the river, but the obstructions caused by them have been removed by artificial means, and for many years there has been uninterrupted navigation by steam vessels of considerable capacity from the Mississippi river, through the Wisconsin and Fox rivers, to Lake Michigan, and thence to the St. Lawrence, engaged in the transportation of passengers and merchandise. Without the improvements by locks, dams and canals, Fox river could not have been navigated by steam boats throughout its entire length. It, however, in connection with the Wisconsin river, formed one of the earliest and most important channels of communication between the Upper Mississippi and the Great Lakes. Before the improvement of the river, frequent portages were necessary in its navigation. It was held in a case decided by the supreme court in 1874, that Fox river is a navigable river, although made so by artificial means and improvements, and that a steamer navigating it is subject to the laws of the United States with regard to the enrollment and license of vessels, and is liable to be proceeded against in admiralty for non-compliance with such laws.⁵¹

§ 531. **Same—Canals.**—A canal, though lying and situated wholly within the territorial limits of one state, which forms a part of a continuous highway for commerce between ports

highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued

highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." The language of this opinion has been recently quoted and reaffirmed by the supreme court. *Perry v. Haines*, 191 U. S. 17-55 (48:73).

⁵¹ *The Montello*, 20 Wall. 430 (22:391).

in different states, and with foreign countries, by its connection with other waters, is a navigable water of the United States, and subject to the admiralty jurisdiction.⁵²

§ 532. Same—The admiralty jurisdiction not controlled by the power to regulate commerce.—The judicial power vested in the general government over causes of admiralty and maritime jurisdiction is not controlled by nor dependent upon the power vested in congress to regulate commerce among the several states and with foreign nations; the judicial power and the commercial power are independent substantive powers, conferred in the constitution by separate and distinct grants, and

⁵² *Perry v. Haines*, 191 U. S. 17-55 (48:73); *Ex parte Boyer*, 109 U. S. 629 (27:1056); *The Avon*, Brown Adm. 170, Fed. Cas. No. 680.

In *Perry v. Haines*, supra, Brown, Justice, delivering the opinion of the court, and holding that the Erie Canal, though wholly within the state of New York, is, by connecting Lake Erie with the Hudson river, a great highway of commerce between ports in different states and foreign countries, a navigable water of the United States, and subject to the admiralty jurisdiction, said:

"The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are wholly within the limits of a particular state. We fail to see, however, that this creates any distinction in principle. They are usually constructed to connect waters navigable by nature, and to avoid the portage of property from one navigable lake or river to another, or to improve or deepen a natural channel; and they are usually navigated by the same vessels which ply between the naturally navigable waters at either end of the canal. Examples of

these are the St. Clair Ship Canal, connecting St. Clair river with the lake of the same name; the St. Mary's Canal, connecting the waters of Lake Superior with those of Lake Huron; the Illinois & Michigan canal, connecting the waters of Lake Michigan with the Mississippi river; the Welland Canal, between Lake Ontario and Lake Erie; the Suez Canal, between the Mediterranean and the Red Sea; The Great North Holland Canal, connecting Amsterdam directly with the German ocean; and the Erie Canal, connecting Lake Erie and the Hudson River. Indeed, most of the harbors upon the lakes and the Atlantic coast are made accessible by canals wholly artificial, or by an artificial channel broadening and deepening their natural approaches. Can it be possible that a cause of action which would be maritime, if occurring upon those connected waters, would cease to be maritime if arising upon the connecting waters? Must a collision which would give rise to a suit in admiralty if occurring upon Lake Ontario, or Lake Erie, be prosecuted at common law, if happening upon the Welland Canal?"

vested in separate and distinct co-ordinate branches of the government. The admiralty jurisdiction cannot be controlled by nor be made to depend upon regulations of commerce. It is wholly unaffected by the character of commerce engaged in by the vessels involved. The navigability of the waters being established, and it being shown that they are public navigable waters of the United States, then so far as concerns the admiralty jurisdiction over causes of action arising upon such waters out of marine torts or maritime contracts, it is wholly immaterial whether the vessels involved are engaged in purely local commerce, or in commerce among the states or with foreign nations.⁵³ In the case of a marine tort arising out of a collision, it makes no difference as to the jurisdiction that, at the time of the collision one of the vessels was on a voyage from one place to another in the same state;⁵⁴ and in a suit upon a marine contract for the transportation of merchandise the jurisdiction of the court is wholly unaffected by the fact that, under the contract the place and port of shipment and the place and port of destination are in one and the same state.⁵⁵

§ 533. Same—What are navigable waters is a judicial question.—The question as to what are public navigable waters of the United States, and embraced within the scope of the admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted, is a judicial question, to be determined in the last resort by the federal supreme court. As shown by the judicial history of the country, it has always been treated as a judicial question. By the judiciary, the common law rule making the ebb and flow of the tide the test of navigability and admiralty was first adopted; and by the judiciary that rule was afterwards abandoned and repudiated, and the modern rule of navigability in fact adopted as the test of jurisdiction, and applied in the actual adjudication of cases to different waters, such as the

⁵³ *The Genesee Chief*, 12 How. 443 (13:1058); *The Propeller Commerce*, 1 Black, 574 (17:107); *The Belfast*, 7 Wall. 624 (19:266); *Ex parte Boyer*, 109 U. S. 629 (27:1056); *Perry v. Haines*, 191 U. S. 17-55 (48:73).

⁵⁴ *The Propeller Commerce*, 1

Black, 574 (17:107); *Ex parte Boyer*, 109 U. S. 629 (27:1056).

⁵⁵ *The Belfast*, 7 Wall. 624 (19:266); *Perry v. Haines*, 191 U. S. 17-55 (48:73); *Re Garnett*, 141 U. S. 1 (35:631); *The E. M. McChesney*, 8 Ben. 150, Fed. Cas. No. 4,463.

Grand river in Michigan, the Fox river in Wisconsin, the Illinois and Michigan canal, which is wholly within the state of Illinois, and the Erie canal which is wholly within the state of New York. The principles of the constitution and judicial practice and precedents support the proposition that navigability and jurisdiction are exclusively a judicial question. Congress has no power to determine that question so as to bind the judiciary.⁵⁶

§ 534. **Rule defining navigable waters of the state.**—If a river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the state, then it is not a navigable water of the United States, but only a navigable water of the state.⁵⁷

§ 535. **The constitutional grant of judicial power over admiralty and maritime causes did not operate as a cession of navigable waters.**—The constitutional grant to the federal government of judicial power over “all cases of admiralty and maritime jurisdiction” did not operate as a cession to that government of the public navigable waters situated within the limits of the states, nor of general legislative jurisdiction over those waters; but, subject to the paramount authority of the general government to exercise full and complete admiralty and maritime jurisdiction and to regulate foreign and interstate commerce, the states, each respectively, retains municipal sovereignty and jurisdiction over all public navigable waters within its territorial limits, including tide waters, extending one marine league from the seashore at low water mark into the sea.⁵⁸

⁵⁶ *The Genesee Chief*, 12 How. 443 (13:1058); *Fretz v. Bull*, 12 How. 466 (13:1068); *The Magnolia*, 20 How. 296 (15:909); *The Daniel Ball*, 10 Wall. 557 (19:999); *The Montello*, 20 Wall. 430 (22:391); *Ex parte Boyer*, 109 U. S. 629 (27:1056); *Perry v. Haines*, 191 U. S. 17, 55 (48:73); *The Thomas Jefferson*, 10 Wheat. 428 (6:358).

⁵⁷ *The Montello*, 11 Wall. 411 (20:191), cited arguendo with ap-

proval in *Perry v. Haines*, 191 U. S. 17-55 (48:73); *Brown*, Justice, delivering the opinion of the court, saying: “It is not intended here to intimate that, if the waters, though navigable, are wholly territorial and used only for local traffic—such, for instance, as the interior lakes of the state of New York—they are to be considered as navigable waters of the United States.”

⁵⁸ *United States v. Bevans*, 3

§ 536. **Criminal jurisdiction in admiralty.**—The courts of the United States, merely by the grant of judicial power over causes of admiralty and maritime jurisdiction, and in the absence of appropriate legislation by congress, have no criminal jurisdiction in admiralty, the criminal jurisdiction of the federal courts being derived wholly from the statutes of the United States enacted in the execution of some power granted by the constitution;⁵⁹ but congress has enacted a criminal admiralty code, the provisions of which are contained in the revised statutes here cited, and to which the reader is referred.⁶⁰

§ 537. **History of federal legislation vesting admiralty jurisdiction—Ninth section of the original judiciary act.**—The ninth section of the original judiciary act, which defined the jurisdiction of the district courts, contains, among other provisions, the following:

“And shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.”⁶¹

§ 538. **Same—Same—Seizures upon water.**—When that part of the ninth section of the judiciary act in regard to seizures—“including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well

Wheat. 336–391 (4:404); *Manchester v. Commonwealth of Massachusetts*, 139 U. S. 240, 266 (35:159), affirming S. C. 152 Mass. 230–246, 9 L. R. A. 236, 25 N. E. 118, 23 Am. St. R. 820–836, and note 837–841; *McCready v. Virginia*, 94 U. S. 391 (24:248); *Smith v. Maryland*, 18 How. 74 (15:269).

⁵⁹ *United States v. Bevans*, 3 Wheat. 336–391 (4:404); *Manchester v. Commonwealth of Massachusetts*, 139 U. S. 240, 266 (35:159);

Ex parte Byers, 32 Fed. 405; *United States v. Peterson*, 64 Fed. 147; *Commonwealth v. Peters*, 12 Met. 393.

⁶⁰ U. S. Rev. Stat. Title LXX, ch. 3, secs. 5339–5391, 3 U. S. Comp. Stat. 1901, pp. 3625–3653; 3 Fed. Stat. Anno. 231–237.

⁶¹ 1 U. S. Stat. at L. ch. 20, pp. 73–79; 2 Bates Fed. Eq. Proc. appendix II, pp. 907–926, where the original judiciary act September 24, 1789, is reproduced in full.

as upon the high seas"—first came under judicial consideration it was contended that such seizures were not, and were not intended by congress to be, within the admiralty and maritime jurisdiction of the court, but were cognizable by it on its common law side only, and that the parties were entitled to a trial as at common law by a common law jury; but that contention was overruled by the court, and such seizures were held to be civil causes of admiralty and maritime jurisdiction, and were to be tried by the court without a jury.⁶²

§ 539. **Same—Act of February 26, 1845—Founded in judicial mistake.**—As a result of the decision of the supreme court, restricting the admiralty and maritime jurisdiction to the ebb and flow of the tide,⁶³ congress, for the relief of navigation and commerce upon the great lakes, which are, in fact, inland seas, but not affected by the tide,⁶⁴ enacted the statute of February 26, 1845, entitled "an act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same."⁶⁵

This statute, in substance, conferred upon the district courts the same jurisdiction in matters of contract and tort concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, employed in commerce and navigation between ports in different states and territories upon the lakes and navigable waters connecting them, as was then exercised by said courts in cases of like steamboats and vessels, employed in like navigation and commerce upon the high seas, or tide waters within the admiralty and maritime jurisdiction of the United States; and it was directed that in suits arising under the act the regular admiralty procedure should be followed and that the maritime law should, so far as applicable, constitute the rule of decision in such suits, saving to the parties the right of trial by jury of all facts put in issue in such suits, when required by either party, and saving also to the parties the right of a con-

⁶² United States v. La Vengeance, 3 Dall. 397 (1:610); United States v. The Betsey, 4 Cranch, 443 (2:673); United States v. The Sally, 2 Cranch, 406 (2:320); The Samuel, 1 Wheat. 9 (4:23); The Sarah, 8 Wheat. 391 (5:644).

⁶³ The Thomas Jefferson, 10 Wheat. 426 (6:358).

⁶⁴ The Genesee Chief, 12 How. 443-459 (13:1058).

⁶⁵ 5 U. S. Stat. at L. ch. 22, pp. 726, 727.

current remedy at common law, where it was competent to give it, and any concurrent remedy given by state laws.

It was in a case involving a construction of this statute, that the court overruled its previous decisions restricting the admiralty jurisdiction to the ebb and flow of the tide, and establishing the doctrine of navigability in fact as the test of admiralty and maritime jurisdiction, from which it appears that congress was misled by the earlier decisions, and that the above-mentioned statute was founded in judicial mistake.⁶⁶

§ 540. ~~Same—Same—Same—~~**Obsolete legislation.**—The effect of the decision in the *Genesee chief*⁶⁷ has been to establish the doctrine that the words, “and shall also have exclusive original cognizance of all causes of admiralty and maritime jurisdiction,” contained in the ninth section of the original judiciary act were operative and effective to vest in the district courts full and complete admiralty and maritime jurisdiction, not only upon the high seas and tide waters, but also upon all the public navigable lakes and rivers of the United States, without the aid of further words; and, therefore, as a result of the above mentioned decision, the clause of the ninth section of the original judiciary act in regard to seizures on waters, and the whole of the act of February 26, 1845, with the exception of the clause which gives to either party the right of trial by jury when requested, have become obsolete and of no effect,⁶⁸ and were, in the revision of the federal laws, omitted from the maritime code.⁶⁹

§ 541. **The state courts have no admiralty jurisdiction.**—The state courts have no jurisdiction over admiralty and maritime causes. The jurisdiction of the federal courts over such causes is exclusive of the state courts. To this rule there is no exception. In a class of cases of admiralty jurisdiction the state courts may furnish a common law remedy concurrent with the remedy in admiralty; but there is a broad distinction between concurrent remedies and concurrent jurisdiction. If the remedy furnished by the state court is essentially a

⁶⁶ The *Genesee Chief*, *supra*.

⁶⁷ 12 How. 443-459 (13:1058).

⁶⁸ The *Eagle*, 8 Wall. 15-26 (19:365); The *Hine v. Trevor*, 4 Wall. 555 (18:451); The *Magnolia*, 20 How. 296 (15:909); The *Belfast*,

7 Wall. 624-646 (19:266); *Ex parte Boyer*, 109 U. S. 629 (27:1056).

⁶⁹ U. S. Rev. Stat. sec. 563, cl. 8, and sec. 566; 4 Fed. Stat. Anno. 220-233 and 236-237.

proceeding in admiralty, it is an invasion of the exclusive jurisdiction of the federal courts, and cannot be maintained.⁷⁰

§ 542. **Same—The states may create maritime liens, but cannot confer on their own courts admiralty jurisdiction to enforce them.**—The several states may, by appropriate legislation, create maritime liens as a security for the performance of maritime contracts, concerning domestic vessels, but they cannot confer upon their courts jurisdiction in admiralty to enforce such liens. A state may, by statute, create a lien for repairs and necessary supplies made and furnished to a vessel in her home port, or a port of the state to which she may belong;⁷¹ but, the contract for such repairs and supplies, and the lien given by the state statute to secure the performance of the contract, both being maritime, can only be enforced by suit *in rem* in the district courts of the United States in admiralty, the state having no power to vest its courts with jurisdiction over such causes.⁷²

§ 543. **Same—Same—State cannot create lien on foreign vessels.**—The rule which allows a state to create a maritime lien on vessels applies to domestic vessels only—that is, vessels owned within the state; and the rule does not apply to foreign vessels—that is, owned in other states or foreign countries.⁷³

§ 544. **Contract and tort the sources of admiralty and maritime jurisdiction—Exceptions.**—Causes of admiralty and maritime jurisdiction, according to the usual classification, arise either out of (1) maritime contracts or (2) marine torts.⁷⁴

⁷⁰ *The Moses Taylor*, 4 Wall. 411 (18:397); *The Hine v. Trevor*, 4 Wall. 555 (18:451); *The Belfast*, 7 Wall. 624–646 (19:266); *The Glide*, 167 U. S. 606–624 (42:296); *Perry v. Haines*, 191 U. S. 17–55 (48:73); *The Knapp Company v. McCaffrey*, 177 U. S. 638–648 (44:921); *The Lottawana*, 21 Wall. 558–609 (22:654); U. S. Rev. Stat. sec. 711, cl. 3, 1 U. S. Comp. Stat. 1901, p. 577, 4 Fed. Stat. Anno. p. 494.

⁷¹ *The General Smith*, 4 Wheat. 438 (4:609); *Pyrroux v. Howard*, 7

Pet. 324 (8:700); *The St. Lawrence*, 1 Black, 522 (17:108); *The Glide*, 167 U. S. 606 (42:296).

⁷² *The Glide*, 167 U. S. 606 (42:296); *Perry v. Haines*, 191 U. S. 17–55 (48:73); *The Moses Taylor*, 4 Wall. 411 (18:397); *The Hine v. Trevor*, 4 Wall. 555 (18:451); *The Belfast*, 7 Wall. 624 (19:266); *The Lottawana*, 21 Wall. 559 (22:654).

⁷³ *The Roanoke*, 189 U. S. 185–199 (47:770).

⁷⁴ *The Belfast*, 7 Wall. 624 (19:266).

This classification is not, however, legally exact. There are many cases in admiralty arising out of sources which are neither contract nor tort. This is true in prize causes, in which the seizure is made *jure belli*, and the adjudication is made according to the laws of nations.⁷⁵ And it is held by eminent authority that salvage, jettison and general average are neither matters of contract nor tort.⁷⁶ Libels authorized to be filed under the "Limited Liability Act," are prosecuted to obtain a benefit secured to shipowners by law, and assert a right arising out of the law, and cannot be said to arise out of either tort or contract.⁷⁷

§ 545. **Maritime contracts.**—The true criterion by which to determine whether or not a contract is maritime, is the subject-matter of the contract, and the system of laws out of which it arises and by which it is governed. If the contract pertains solely to the business of marine commerce and navigation, and arises out of, and is controlled by the maritime law, it is a maritime contract.⁷⁸

§ 546. **Same—Contract not maritime—Building ship.**—A contract for building a ship or other marine vessel or craft, or for supplying materials for its construction, is not a marine contract, and, therefore, not within the admiralty jurisdiction; and the several states may, by appropriate legislation, create liens to secure the performance of such contracts, and provide remedies for the enforcement and foreclosure of such liens through their own courts.⁷⁹

§ 547. **Same—Same—Mortgage of vessel.**—An ordinary mortgage of a vessel, whether made to secure the purchase money upon a sale thereof, or to raise money for general purposes, is not a maritime contract, and a court of admiralty, therefore, has no jurisdiction of a libel to foreclose it; or to

⁷⁵ Prize Cases, 2 Black, 635 (17:459).

⁷⁶ The Eagle, 8 Wall. 15 (19:365).

⁷⁷ Butler v. Steamship Co., 130 U. S. 527 (32:1017); Steamship Co. v. Mount, 103 U. S. 239, 250 (26:351); Admiralty Rules LIV-LVII.

⁷⁸ Insurance Co. v. Dunham, 11 Wall. 1-36 (20:90); The Moses

Taylor, 4 Wall. 411 (18:397); De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776.

⁷⁹ People's Ferry Co. v. Beers, 20 How. 393 (15:294); Roach v. Chapman, 22 How. 129 (16:294); Edwards v. Elliott, 21 Wall. 532 (22:487); Johnson v. Elevator Co., 119 U. S. 388 (30:447); Sheppard v. Steel, 43 N. Y. 52, 3 Am. Rep. 660.

assert either title or right of possession under it;⁸⁰ but after a vessel has been sold by the order of a court of admiralty and the proceeds have been paid into the registry, the court has jurisdiction, upon a petition of intervention, to pass upon the claim of the mortgagee and all other persons to the fund, and to determine the priority of the various claims, and to order distribution.⁸¹

§ 548. ~~Same—Same—Same—Mortgage not made maritime contract by the registry act.~~—The act⁸² of congress of July 29, 1850, providing for recording bills of sale, mortgages, hypothecations and conveyances of vessels, did not have the effect to convert such mortgages into maritime contracts. The first section of that act, as carried into the Revised Statutes, is as follows:

“No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials, necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section.”⁸³

The enactment is a mere registry act, intended to prevent mortgages and other conveyances of vessels from having any effect which they might have had before against persons other than the grantor or mortgagor, and those claiming under him, or having actual notice thereof, unless recorded as therein provided; it manifests no intention to confer upon the mortgagee any new right, or to make the mortgage a maritime contract, or the lien thereby created a maritime lien, or to in any way inter-

⁸⁰ *Bogart v. The John Jay*, 17 How. 399 (15:95); *Schuchardt v. Babbidge*, 19 How. 239, 241 (15:625); *Rea v. The Eclipse*, 135 U. S. 599, 608 (34:269).

⁸¹ *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345); *The Lottawana*, 21 Wall. 558, 582 (22:654); *Andrews*

v. Wall, 3 How. 568 (11:729); *Schuchardt v. Babbidge*, 19 How. 239 (15:625); Admiralty Rule 43.

⁸² 9 U. S. Stat. at L. ch. 27, sec. 1, p. 440.

⁸³ U. S. Rev. Stat. sec. 4192; 7 Fed. Stat. Anno. pp. 42-44.

fere with maritime contracts or liens or the priority thereof, or with the jurisdiction and procedure in admiralty.⁸⁴

§ 549. **Marine torts.**—The test of admiralty jurisdiction arising out of tort is locality. The tort must have been committed upon navigable waters,⁸⁵ and the fact that the tort occurred upon navigable waters lying within the limits of another sovereignty constitutes no objection to the exercise of the jurisdiction;⁸⁶ and, marine torts being in the nature of trespasses upon the person or upon personal property, may be prosecuted in admiralty *in personam* in any district where the offending party can be served, or *in rem* wherever the offending thing is found within the jurisdiction of the court issuing the process.⁸⁷

In a late case, the supreme court departed from the rule requiring the tort, as a ground of jurisdiction, to be committed on navigable waters, and held that the admiralty had jurisdiction of a libel *in rem* against a British vessel for the negligent destruction of a beacon, established by the government as an aid to navigation, which stood fifteen or twenty feet from the Mobile river or bay, in water twelve or fifteen feet deep, built on piles firmly driven into the bottom, and attached to the realty and a part of it by the ordinary criteria of the common law.⁸⁸

§ 549a. **Maritime liens—Defined.**—One of the most important functions of the courts of admiralty is the enforcement of maritime liens, by suits *in rem*, a judicial remedy not known at the common law, but derived from the civil law.⁸⁹

In an early case, the supreme court, in its opinion, judicially defined maritime liens, and to that definition it has ever since adhered without variableness or shadow of turning, and upon

⁸⁴ *The J. E. Rumbull*, 148 U. S. 1, 21 (37:345); *The Lottawana*, 21 Wall. 558 (22:654).

⁸⁵ *The Propeller Commerce*, 1 Black, 574 (17:107); *The Eagle*, 8 Wall. 15 (19:365); *Ex parte Boyer*, 109 U. S. 629 (27:1057); *Nelson v. Leland*, 22 How. 48 (16:269); *The Magnolia*, 20 How. 296 (15:909); *Packet Co. v. Bridge Co.*, 6 Wall. 213, 216 (18:753).

⁸⁶ *The Eagle*, 8 Wall. 15 (19:365).

⁸⁷ *The Propeller Commerce*, 1 Black, 514 (17:107); *Nelson v. Leland*, 22 How. 48 (16:269).

⁸⁸ *The Blackheath*, 195 U. S. 361-369 (49:236), overruling *The Plymouth*, 3 Wall. 20 (18:125).

⁸⁹ *The Moses Taylor*, 4 Wall. 411, 431 (18:397); *The Hine v. Trevor*, 4 Wall. 555, 572 (18:451).

it has largely been built up the maritime law and jurisprudence of this country. The definition is as follows:

“The maritime ‘privilege’ or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is ‘a *jus in re*,’ without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of the courts in admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is, therefore, ‘*stricti juris*,’ and cannot be extended by construction, analogy or inference.”⁹⁰

§ 549b. **Same—Difference between maritime lien and common law lien.**—A maritime lien, unlike a lien at common law, exists without possession of the thing upon which it is asserted, either actual or constructive. The maritime lien, however, confers upon its holder such a right in the thing, that he may, by a suit *in rem*, subject it to condemnation and sale to satisfy his debt or damages. The lien travels with the thing upon which it exists wherever that thing goes, and into whosesoever hands it may pass. It can be made available only by the proceeding *in rem*.⁹¹

§ 550. **Same—The subjects of maritime liens.**—The only subjects of maritime liens are movable things engaged in navigation, or things which are the subjects of commerce on the high seas or other navigable waters; it may arise and exist upon vessels, steamers and rafts, and upon goods and merchandise carried upon them. But it cannot arise upon anything which is fixed and immovable like a wharf, a bridge or real estate of any kind. Though bridges and wharves and

⁹⁰ *Vanderwater v. Mills*, 19 How. 82-92 (15:554), rule reaffirmed in *The J. E. Rumbell*, 148 U. S. 1-21 (37:345); *The Glide*, 167 U. S. 606-624 (42:269).

Bridge Co., 6 Wall. 213, 216 (18. 753); *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345); *The John G. Stevens*, 170 U. S. 113, 127 (42:969); *The Bold Buccleugh*, 7 Moore P. C. C. 267.

⁹¹ *Packet Co. v. Rock Island*

C. C. 267.

other immovable structures may aid commerce by facilitating intercourse on land or the discharge of cargoes, they are not in any sense the subjects of maritime lien.⁹²

§ 551. **Same—A maritime lien is a present right of property.** It seems to be the settled law both in England and in this country, that a maritime lien is a proprietary interest—a present right of property—in the ship. The lienholder is a part owner in interest of the ship.⁹³ It is said that, “in our law it is well established that a maritime lien or privilege, constituting a present right of property, *jus in re*, to be afterward enforced in admiralty by process *in rem*, arises, not only from a collision and for damages caused thereby, but also for necessary supplies and repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port.”⁹⁴

§ 552. **Same—Maritime liens arise out of both contract and tort.**—Maritime liens arise out of maritime contracts,⁹⁵ and also out of marine torts.⁹⁶ A collision between two ships by the negligence of one of them creates a maritime lien upon or privilege in the offending ship, for the damage done to the other, which attaches at the time of the collision, and may be enforced in admiralty by proceedings *in rem* against the offending ship, even in the hands of a *bona fide* purchaser.⁹⁷

§ 553. **Same—When lien is created.**—The maritime lien is created and arises and attaches to the subject thereof, just as soon as the contract is made or the tort is committed, and before the institution of judicial proceedings to enforce it. The lien is created as soon as the claim comes into existence,

⁹² *Packet Co. v. Rock Island Bridge Co.*, 6 Wall. 213, 216 (18:753); *The Alabama*, 19 Fed. 546; *The Alabama*, 22 Fed. 450; *The F. & P. M. Co. No. 2*, 33 Fed. 514; *Seabrook v. Raft*, 40 Fed. 598; *The City of Pittsburg*, 40 Fed. 701; *The Ottawa*, Brown Adm. 359, Fed. Cas. No. 10,616; *The Schooner Maud Webster*, 8 Ben. 533, Fed. Cas. 9,302.

⁹³ *The Bold Buccleugh*, 7 Moore

P. C. C. 267; *The John G. Stevens*, 170 U. S. 113, 127 (42:969).

⁹⁴ *The John G. Stevens*, 170 U. S. 113, 127 (42:969).

⁹⁵ *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345); *The Glide*, 167 U. S. 606, 624 (42:296); *Perry v. Haines*, 191 U. S. 17, 55 (48:73).

⁹⁶ *The John G. Stevens*, 170 U. S. 113, 127 (42:969); *The China*, 7 Wall. 53, 68 (19:67).

⁹⁷ *The John G. Stevens*, 170 U. S. 113, 127 (42:969).

whether arising out of tort or out of contract.⁹⁸ But the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.⁹⁹

§ 554. **Same—Priority of maritime liens.**—It is said that seamen's wages are a sacred lien, and, as long as a plank of the ship remains, the sailor is entitled as against all other persons to the proceeds as a security for his wages.¹ But, as a general rule, other maritime liens have priority and are enforced and paid in inverse order to that in which they accrue.²

§ 555. **Same—Same—Lien arising out of collision takes precedence over antecedent lien for supplies.**—A maritime lien upon a vessel for damages caused by her fault to another vessel takes precedence of a maritime lien for supplies previously furnished to the offending vessel. The collision, as soon as it takes place, creates, as a security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature, or the extent of their interest in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests existing at the time of the collision in the offending vessel whether by way of part ownership, of mortgage, of bottomry bond, or of other maritime liens for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who has furnished necessary supplies to the vessel before the collision, and has thereby acquired, under our law, a mari-

⁹⁸ *The John G. Stevens*, 170 U. S. 113, 127 (42:969); *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345).

⁹⁹ *Vanderwater v. Mills*, 19 How. 82, 92 (15:554); *Schooner Freeman v. Buckingham*, 18 How. 188 (18:341).

¹ *Sheppard v. Taylor*, 5 Pet. 675, 710 (8:269-282); *Brown v. Lull*, 2 Sumn. 443, 452; *Pitman v. Hooker*, 3 Sumn. 50, 58, 3 Kent Com. 197.

² *The John G. Stevens*, 170 U. S. 113, 127 (42:696).

time lien or privilege in the vessel herself, is a part owner in interest at the date of such collision, and the ship in which he and others are interested is liable to the extent of its value at that date for the injury done, without reference to his claim. And a claim by a tow against her tug for damages caused by negligent towage, by bringing the tow into collision with a third vessel, is founded in tort, arising out of the duty imposed by law, and independent of any contract made, or consideration paid or to be paid for the towage; and the claim for damages in such case is entitled to priority of payment over liens on the tug for previous repairs and supplies.³

§ 556. Same—Same—Maritime lien for supplies takes precedence over prior mortgage.—A mortgage on a vessel, although recorded in the office of the collector of customs where such vessel is registered or enrolled, is not a maritime contract and creates no maritime lien; and a maritime lien, whether created by the general maritime law for supplies or repairs furnished to a vessel in a foreign port, or created by the statute of a state for supplies and repairs furnished to a vessel in her home port or in a port of the state to which she belongs, takes precedence over a prior mortgage on the vessel.⁴

³ The *John G. Stevens*, 170 U. S. 113, 127 (42:969); The *Bold Buccleugh*, 7 Moore, P. C. C. 267.

⁴ The *J. E. Rumbell*, 148 U. S. 1, 21 (37:345); *Menge v. Madrid*, 40 Fed. 677; The *Guiding Star*, 9 Fed. 521, S. C. 18 Fed. R. 263, 269. In the *J. E. Rumbell*, *supra*, Mr. Justice Gray, delivering the opinion of the court, said:

“According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage, that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each

rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness for the benefit of all having any title or interest in her. Each creates a *jus in re*, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry af-

§ 557. **Forms of actions or suits in admiralty.**—There are two forms of suits in admiralty, namely: (1) suits *in rem*,⁵ and (2) suits *in personam*;⁶ and the latter class is subdivided into two classes—(1) suits *in personam* without foreign attachment, and (2) suits *in personam* with foreign attachment.⁷ In some cases, suits *in rem* and *in personam* may perhaps be joined in one proceeding.⁸

§ 558. **Same—Jurisdiction in rem based on maritime lien.** The only object of a suit *in rem* is to enforce, make available, and carry into effect a maritime lien; it subserves no other purpose. The lien and the proceeding *in rem* are, therefore, correlative; where the former exists, the latter can be taken, and not otherwise. A maritime lien is the foundation of the proceeding *in rem*.⁹

§ 559. **Same—Intervention pro interesse suo.**—Any person having an interest in any proceeds in the registry of the court of admiralty has the right, by petition and summary proceeding, to intervene *pro interesse suo* for delivery thereof to him; and this he may do, although he could not maintain an original suit in admiralty against the property which produced the fund, nor has a maritime lien on it. The mortgagee of a vessel may maintain such an intervention to have the residue of the proceeds of the vessel paid to him after all maritime liens have been satisfied.¹⁰

ter all maritime liens have been satisfied. It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law.”

⁵ *The Genesee Chief*, 12 How. 443 (13:1058); *The Magnolia*, 20 How. 296 (15:909); *Nelson v. Leland*, 22 How. 48 (16:269); *The Propeller Commerce*, 1 Black, 574 (17:107);

The Eagle, 8 Wall. 15 (19:365); *Ex parte Boyer*, 109 U. S. 629 (27:1057); *The Blackheath*, 195 U. S. 361, 369 (49:236); Admiralty Rules 12-19.

⁶ Admiralty rule 2.

⁷ Admiralty rule 2.

⁸ Admiralty rule 20; *Barton v. Brown*, 145 U. S. 335, 348 (36:727).

⁹ *Packet Co. v. Rock Island Bridge*, 6 Wall. 213, 216 (18:753); *Hatch v. The Steamboat Boston*, 3 Fed. R. 871.

¹⁰ Admiralty rule 43; *The Lottawana*, 21 Wall. 558, 609 (22:654); *Schuchardt v. Babbidge*, 19 How. 239 (15:625); *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345).

(b) **THE EXCLUSIVE ORIGINAL JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES IN ADMIRALTY AND MARITIME CAUSES.**

§ 560. **Jurisdiction of civil causes in admiralty.**—The several district courts of the United States are vested with original jurisdiction of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. And this jurisdiction is exclusive of the state courts; and is also exclusive of the circuit courts of the United States, except in two specified classes of cases.¹¹

§ 561. **Suits on maritime contracts.**—The several district courts of the United States have exclusive original jurisdiction of all admiralty and maritime causes founded upon any maritime contract, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. If the party elects to pursue his common law remedy, he must prosecute his suit in the state court, or in the circuit court of the United States, where that court has jurisdiction under the federal judiciary acts; but if the party elects to sue in admiralty, the district court of the United States has exclusive original jurisdiction.¹²

§ 562. **Suits based on marine torts.**—The several district courts of the United States have exclusive original jurisdiction

¹¹ U. S. Rev. Stat. sec. 563, cl. 8 and 9; U. S. Rev. Stat. sec. 629, cl. 6 and 7; U. S. Rev. Stat. sec. 711, cl. 3; U. S. Rev. Stat. sec. 5308; 4 Fed. Stat. Anno. pp. 230-234, 247-248.

¹² U. S. Rev. Stat. sec. 563, cl. 8 and sec. 711; 4 Fed. Stat. Anno. pp. 220-233; *The Moses Taylor*, 4 Wall. 411 (18:397); *The Belfast*, 7 Wall. 624 (19:266); *The General Smith*, 4 Wheat. 438 (4:609); *The Planter*, 7 Pet. 324 (8:700); *The St. Lawrence*, 1 Black, 522 (17:180); *The Lottawana*, 21 Wall. 559 (22:654); *The Glide*, 167 U. S. 606 (42:296); *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776; *Perry v. Haines*, 191 U. S. 17, 55 (48:73); *The Knapp, Stout & Co. v. McCaffrey*,

177 U. S. 638, 648 (44:921); *The Oscoda*, 66 Fed. R. 347; *The Aca-dea*, Brown Adm. 73, Fed. Cas. No. 24; *The Williams*, Brown Adm. 208, Fed. Cas. No. 17,710; *The Canal Boat W. J. Walsh*, 5 Ben. 72, Fed. Cas. 17,922; *Ex parte Easton*, 95 U. S. 68, 78 (24:373); *Ins. Co. v. Dunham*, 11 Wall. 1 (20:90); *The Eddy*, 5 Wall. 481 (18:486); *Morewood v. Enequist*, 23 How. 491 (16:516); *Andrews v. Wall*, 3 How. 568 (11:729); *Sheppard v. Taylor*, 5 Pet. 675 (8:269); *McKinlay v. Norrish*, 21 How. 343 (16:100); *The Resolute*, 168 U. S. 437 (42:533); *The Grapeshot*, 9 Wall. 129, 145 (19:651).

of all admiralty and maritime causes based on marine torts, saving, as in cases founded on maritime contracts, to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. If the party elects to pursue his common-law remedy, he must prosecute his suit in the state court, or in the circuit court of the United States, where that court has jurisdiction under the federal judiciary acts; but if the party elects to sue in admiralty, the district court of the United States has exclusive original jurisdiction.¹³

§ 563. **Same—Immaterial that the tort is committed within the waters of a foreign country.**—The admiralty jurisdiction of the district courts of the United States over marine torts is not taken away by the fact that the cause of action arose in the waters of a foreign port. That circumstance is immaterial. While in some cases decided by the supreme court it is said that the district courts, as courts of admiralty, have jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States, yet the connection in which those words are found indicates that they were not used restrictively; and the law is entirely well settled, both in England and in this country, that marine torts originating upon navigable waters within the territorial limits of a foreign country may be the subject of a suit in admiralty in a domestic court.¹⁴

§ 564. **Suits to enforce maritime liens.**—The several district courts of the United States are vested with exclusive original jurisdiction of all admiralty and maritime suits *in rem* to enforce maritime liens, whether such liens arise out of contracts

¹³ U. S. Rev. Stat. sec. 563, cl. 8 and sec. 711; 4 Fed. Stat. Anno. pp. 220-233; *The Hine v. Trevor*, 4 Wall. 555 (18:451); *The Genesee Chief*, 12 How. 443 (13:1058); *Fretz v. Bull*, 12 How. 466 (13:1068); *The Magnolia*, 20 How. 296 (15:909); *Nelson v. Leland*, 22 How. 48 (16:269); *The Propeller Commerce*, 1 Black, 574 (17:107); *The Eagle*, 8 Wall. 15 (19:365); *Ex parte Boyer*, 109 U. S. 629 (27:1056); *The Quickstep*, 9 Wall. 665 (19:767); *The Syracuse*, 12 Wall.

167 (20:382); *The Atlas*, 93 U. S. 302 (23:863); *The L. P. Dayton*, 120 U. S. 337 (30:669); *The E. A. Packer*, 140 U. S. 360 (35:453); *The Avon*, Brown Adm. 170, Fed. Cas. No. 680; *The Thomas Carroll*, 23 Fed. 912; *Panama Railroad Co. v. Napier Shipping Co.*, 166 U. S. 280, 290 (41:1004).

¹⁴ *Panama Railroad Co. v. Napier Shipping Co.*, 166 U. S. 280, 290 (41:1004); *The Eagle*, 8 Wall. 15, 26 (19:365); *The Avon*, Brown Adm. 170; *The Diana*, 1 Lush. 539.

or torts or by operation of law, and whether created by the general maritime law or the statute of a state.¹⁵

§ 565. **The ship and the owner not to be joined in the same libel.**—In suits in admiralty by material-men for supplies or repairs or other necessities, for mariners' wages, for pilotage, for damages by collision, for sea batteries, or suits founded on maritime hypothecation of ship or freight by the master, or suits on bottomry bonds, or for salvage, as defined in the admiralty rules, the ship and the owner cannot be joined in the same libel.¹⁶ Admiralty rules, twelve to twenty inclusive, were intended to prescribe a remedy appropriate to each class of cases in admiralty, allowing in certain cases a joinder of ship and freight, or ship and master, or alternative actions against the ship, master, or owner alone. In no case, however, under these rules, except in possessory suits, can the ship and owner be joined in the same libel, though perhaps they may be in cases not falling within the rules.¹⁷

§ 566. **Jurisdiction of suits by material-men.**—The several district courts have exclusive original jurisdiction of all suits in admiralty by material-men for supplies or repairs or other necessities;¹⁸ and, in all such suits, "the libelant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*."¹⁹

In the admiralty and maritime law of this country, the following propositions are established as the settled law, viz:

(1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty.²⁰

¹⁵ *The Hine v. Trevor*, 4 Wall. 555 (18:451); *The Moses Taylor*, 4 Wall. 411 (18:397); *The Belfast*, 7 Wall. 624 (19:260); *The Lottawana*, 21 Wall. 559 (22:654); *The Glide*, 167 U. S. 606 (42:296); *Perry v. Haines*, 191 U. S. 17, 55 (48:73); *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345).

¹⁶ Admiralty rules, 12 to 20 inclusive.

¹⁷ *The Corsair*, 145 U. S. 335, 348 (36:727); *The Sabine*, 101 U. S. 348

(28:982); *The Ethel*, 66 Fed. R. 342, S. C. 30 U. S. App. 214.

¹⁸ *The Glide*, 167 U. S. 606 (42:296); *Perry v. Haines*, 191 U. S. 17, 55 (48:73); *The General Smith*, 4 Wheat. 438 (4:609).

¹⁹ Admiralty rule 12.

²⁰ *The General Smith*, 4 Wheat. 438 (4:609); *The St. Jago de Cuba*, 9 Wheat. 409 (6:122); *The Virgin v. Vyfhius*, 8 Pet. 538 (8:1036); *United States v. Neurea*, 19 How. 22 (15:531); *The Grapeshot*

(2) For repairs or supplies furnished to a vessel in her home port, or a port of the state to which she belongs, no lien exists in admiralty under the general law, and independently of local statute.²¹

(3) Whenever the statute of a state gives a lien for repairs or supplies furnished to a vessel in her home port, or a port of the state to which she belongs, the contract being maritime, the lien created by the state statute is a maritime lien, and is, by the principles of the maritime law, given the same rank as maritime liens given by that law for repairs and supplies furnished in a foreign port, and, therefore, may be enforced in the admiralty courts of the United States by a proceeding *in rem*.²²

(4) This maritime lien, created by the state statute, and which is to be enforced by proceeding *in rem*, is within the exclusive jurisdiction of the admiralty courts of the United States, and, under the present distribution of the admiralty jurisdiction, cognizance of such suits is vested exclusively in the district courts.²³

(5) The fundamental reasons upon which the proposition, that maritime liens created by state statutes are within the exclusive jurisdiction of the courts of admiralty of the United States, are, that the entire judicial power over admiralty and maritime causes is by the constitution vested in the general government, and the admiralty and maritime jurisdiction of the federal courts can neither be enlarged nor restricted by state legislation, nor can the states exercise any part of that jurisdiction; and, therefore, when a state, by statute creates a lien to secure within its territorial limits, the performance of a contract which is essentially maritime in its nature, and on that account within the exclusive jurisdiction of the admiralty courts of the United States, the lien, so created, being an inci-

v. Wallerstein, 9 Wall. 129 (19:651); Hazlehurst v. The Lulu, 10 Wall. 192 (19:906); Pendergast v. Kalorama, 10 Wall. 204 (19:941); The Patapsco, 13 Wall. 239 (20:696); Pritchard v. Beatly, 17 Wall. 660 (21:683).

²¹ The General Smith, 4 Wheat. 438 (4:609); The Lottawana, 21 Wall. 558 (22:654); The St. Jago de Cuba, 9 Wheat. 409 (6:122).

²² Peyroux v. Howard, 7 Pet. 324 (8:700); The Lottawana, 21 Wall. 558 (22:654); The St. Lawrence, 1 Black, 522 (17:180); The Glide, 167 U. S. 606 (42:296); Perry v. Haines, 191 U. S. 17, 55 (48:73).

²³ The Glide, 167 U. S. 606 (42:296); Perry v. Haines, 191 U. S. 17, 55 (48:73); The Lottawana, 21 Wall. 559 (22:654).

dent to the contract, is, itself, maritime, and must be enforced by the federal courts of admiralty, they being vested by the constitution and laws with exclusive jurisdiction of such causes.²⁴

§ 567. **Jurisdiction of suits by seamen for wages.**—All persons (apprentices excepted) who shall be employed or engaged to serve in any capacity on board of any vessel belonging to any citizen of the United States shall be deemed and taken to be seamen,²⁵ their contracts for service and compensation are maritime, and the several district courts of the United States have exclusive original jurisdiction of all suits in admiralty for seamen's wages;²⁶ and in all such suits, "the libelant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or the master alone *in personam*."²⁷

§ 568. **Same—Wages not dependent on freight.**—The ancient rule of the sea that "freight is the mother of wages" has been abolished by act of congress, providing that "no right to wages shall be dependent on the earning of freight by the vessel."²⁸

§ 569. **Jurisdiction of suits by master for his wages.**—Every person having the command of any vessel belonging to any citi-

²⁴ *The Glide*, 167 U. S. 606, 624 (42:296); *The J. E. Rumbell*, 148 U. S. 1, 21 (37:345); *Perry v. Haines*, 191 U. S. 17, 55 (48:73).

²⁵ U. S. Rev. Stat. sec. 4612; 6 Fed. Stat. Anno. p. 930; *Saylor v. Taylor*, 23 C. C. A. 343.

²⁶ *Sheppard v. Taylor*, 5 Pet. 675 (8:269); *Lee v. Ins. Co.*, Fed. Cas. No. 8,190; *Desbrow v. Walsh Bros.* 36 Fed. R. 607; *The W. F. Brown*, 46 Fed. 290, *Wishart v. The Nixon*, 43 Fed. R. 926; *The Atlantic*, 53 Fed. R. 607; *The Lucy Anne*, 3 Ware, 253, Fed. Cas. 8,596.

²⁷ Admiralty rule 13; *The Ethel*, 13 C. C. A. 504, 66 Fed. R. 340; *Sheppard v. Taylor*, 5 Pet. 675 (8:269). *Baines v. The James*, Bald. 567, Fed. Cas. No. 756; *The Heaton*, 43 Fed. R. 595; *Plummer v. Webb*, 4 Mason, 380, Fed. Cas.

No. 11,233; *The Steamboat Ohio*, Gilp. 505, Fed. Cas. No. 17,825; *Thackarly v. The Farmer of Salem*, Gilp. 524, Fed. Cas. No. 13,852; *The Coal Boat D. C. Salisbury*, Olc. Adm. 71, Fed. Cas. No. 3,694; *The Ship Harriet*, Olc. Adm. 229, Fed. Cas. No. 6,897; *Gurney v. Crockett* Abb. Adm. 490, Fed. Cas. 5,874; *The Enterprise*, Fed. Cas. 6,151; *Martin v. Acker*, Fed. Cas. 9,155; *Macomber v. Thompson*, Fed. Cas. No. 8,919; *The Sloop Canton*, 1 Sprague, 437, Fed. Cas. No. 2,388; *The May Queen*, 1 Sprague, 588.

²⁸ U. S. Rev. Stat. sec. 4525; 6 Fed. Stat. Anno. p. 863; *The Ocean Spray*, 4 Sawy. 105, Fed. Cas. No. 10,412; *Brown v. Chandler*, Fed. Cas. No. 1,998; *The Niphous Crew*, Fed. Cas. No. 10,277; *The Saratoga*, 2 Gall. 164, Fed. Cas. No. 12,355.

zen of the United States shall be deemed and taken to be the master thereof,²⁹ and his contract is maritime, and the several district courts of the United States have exclusive original jurisdiction of all suits in admiralty upon such contracts to recover wages;³⁰ but in such suits the master can proceed *in personam* only, as, under the general maritime law he has no lien.³¹

§ 570. **Towage contracts.**—Towage contracts are maritime, and the several district courts of the United States have exclusive original jurisdiction of all suits in admiralty based on such contracts;³² but a suit in admiralty by the owner of a tow against her tug to recover for an injury to the tow sustained by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu*, the contract in such suit being alleged by way of inducement only to the real grievance complained of, which is the wrong suffered by the libellant in the injury or destruction of his boat resulting from the negligence of the tug.³³

§ 571. **Jurisdiction of suits to recover compensation for pilotage.**—Pilotage is a strictly maritime service, and the district courts of the United States have original exclusive jurisdiction of all suits in admiralty brought to recover compensation for pilotage performed or tendered, although arising under state laws;³⁴ but the concurrent remedy at law is fre-

²⁹ U. S. Rev. Stat. sec. 4612; 6 Fed. Stat. Anno. p. 930.

³⁰ *The Hoag*, 168 U. S. 443. 444 (42:537).

³¹ *Orleans v. Phœbus*, 11 Pet. 175 (9:677).

³² *The Oscoda*, 66 Fed. R. 347; *The Williams*, Brown's Adm. 208, Fed. Cas. No. 17,710; *The Canal Boat W. J. Walsh*, 5 Ben. 72, Fed. Cas. No. 17,922; *The Acadia*, Brown, Adm. 73, Fed. Cas. No. 24; *Ward v. Banner*, Fed. Cas. No. 17,149; *The Erastina*, 50 Fed. R. 126.

³³ *The John G. Stevens*, 170 U. S. 113, 127 (42:969); *The Arturo*, 6 Fed. R. 308; *The Brooklyn*, 2 Ben. 547; *The Deer*, 4 Ben. 352; *The Liberty* No. 4, 7 Fed. R. 226; *The*

Quickstep, 9 Wall. 665 (19:767); *The Syracuse*, 12 Wall. 167 (20:383).

³⁴ *Ex Parte McNeill*, 13 Wall. 236, 243 (20:624); *Ex parte Hager*, 104 U. S. 521 (26:876); *The Edith Godden*, 25 Fed. R. 511; *Glenarne*, 7 Sawy. 202; *The Schooner Kalmar*, 10 Ben. 243, Fed. Cas. No. 7,601; *Hobart v. Droган*, 10 Pet. 108 (9:363); *The California*, 1 Sawy. 463; *The Wane*, Fed. Cas. No. 17,297; *The George S. Wright*, Deady, 591, Fed. Cas. No. 5,340; *The Schooner Anne*, Fed. Cas. No. 412; *The Alzena*, 14 Fed. R. 174; *The Brig. America*, 1 Lowell, 176, Fed. Cas. No. 289; *The Lidia Fowler*, 113 Fed. R. 605.

quently resorted to in the state courts to recover pilotage, in which case it is strictly a personal action.³⁵ In all suits in admiralty "for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam*."³⁶

§ 572. **Same—State laws regulating pilots are constitutional.** By an act of congress approved August 7, 1789, it was provided, "That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress."³⁷ This early recognition of the right of the states to enact such legislation, has resulted in the establishment, by all the maritime states, of a complete and compulsory code of pilot regulations, which have been held by the supreme court to be constitutional.³⁸

§ 573. **Jurisdiction of suits for salvage.**—Salvage is a strictly maritime service, and suits in admiralty to recover it are within the exclusive original jurisdiction of the district courts of the United States;³⁹ and, "in all suits for salvage, the suit

³⁵ *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299 (13:996); *Thompson v. Darden*, 198 U. S. 310, 317 (49:1064).

³⁶ Admiralty rule 13.

³⁷ 1 U. S. Stat. at L. ch. 9, sec. 4, p. 54; U. S. Rev. Stat. sec. 4235; 5 Fed. Stat. Anno. p. 747. In the revision, that clause of the statute referring to future state legislation was omitted.

³⁸ *Cooley v. Board of Wardens of The Port of Philadelphia*, 12 How. 299 (13:996); *Ex parte McNell*, 13 Wall. 236, 243 (20:624); *Olsen v. Smith*, 195 U. S. 332, 345 (49:224); *Thompson v. Darden*, 198 U. S. 310, 317 (49:1064); *Wilson v. McNamee*, 102 U. S. 572 (26:234).

In *Olsen v. Smith*, *supra*, Mr. Justice White delivering the opinion of the court, construing the

pilotage laws of the state of Texas, said:

"The first contention in effect is that the state was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long been settled that even though state laws concerning pilotage are regulations of commerce, 'they fall within that class of powers which may be exercised by the states until congress has seen fit to act upon the subject.'"

³⁹ *Houseman v. The Schooner North Carolina*, 15 Pet. 40 (10:653); *The Steamboat Cheesman v. Two Ferry Boats*, 2 Bond, 363, Fed.

may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request or for whose benefit the salvage service has been performed.”⁴⁰

§ 574. **Same—Libel for salvage against the United States.**—Under the second section of the Tucker Act, defining the concurrent jurisdiction of the court of claims and the district courts of the United States, a district court has jurisdiction in admiralty of a libel *in personam* for salvage against the United States.⁴¹

§ 575. **General average contribution.**—General average contribution is defined to be a contribution by all the parties in a sea adventure to make good all the losses sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to average are usually divided into two classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

Five things must concur in order to constitute a valid claim for general average contribution, namely: (1) There must be a common danger to which the ship, cargo, and crew were all exposed, and that danger must be imminent and apparently

Cas. No. 2,633; *Western Transp. Co. v. The Great Western*, Fed. Cas. No. 17,443; *Gates v. Johnson*, Fed. Cas. No. 5,268; *The Barge Jennie Lind*, New. Adm. 443, Fed. Cas. 17,723; *The Roanoke*, 50 Fed. R. 574; *The Louisa Jane*, 2 Lowell 295, Fed. Cas. No. 8,532; *Muntz v. A Raft of Timber*, 15 Fed. R. 555; *Fifty Thousand Feet Timber*, 2 Lowell, 64, Fed. Cas. No. 4,783; *The Huntsville*, Fed. Cas. No. 6,916; *McMullin v. Blackburn*, 59 Fed. R. 177; *McConnochie v. Kerr*, 9 Fed. R. 50.

⁴⁰ Admiralty Rule 19; *United States v. Cornell Steamboat Co.* (advanced sheets, June 15, 1906).

⁴¹ *United States v. Cornell Steamboat Co.* (advanced sheets June 15, 1906), and see further as to the responsibility of the government for salvage service, the following cases: *The Davis*, 10 Wall. 15 (19:875); *United States v. Wilder*, 3 Sumn. 308, Fed. Cas. 16,694; *The Exchange v. McFadden*, 7 Cranch, 116 (3:287); *The Siren*, 7 Wall. 152, 165 (19:129).

inevitable, except by incurring a loss of a portion of the associated interests to save the remainder; (2) there must be the voluntary sacrifice of a part for the benefit of the whole, as for example, a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests; (3) the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case; (4) the sacrifice must be made by the master or owner, or other person charged with the control and protection of the common adventure, and representing and acting for all interests included in that adventure, and those only; and (5) the sacrifice must not be caused by the fault or negligence of any of the persons in interest.⁴²

The district courts of the United States have exclusive original jurisdiction of all suits in admiralty for general average contribution,⁴³ but the concurrent common-law remedy is frequently resorted to in order to enforce such rights.⁴⁴

§ 576. Jurisdiction of suits on policies of marine insurance. A policy of marine insurance is a maritime contract, having reference to maritime transactions, springing from the law maritime, and deriving all its material rules and incidents from that system; and the district courts of the United States have exclusive original jurisdiction of all suits in admiralty based on such contracts.⁴⁵

A contract of marine insurance is neither commerce nor an instrumentality of commerce, but a mere incident of commercial intercourse; and a state has the undoubted power to prohibit foreign insurance companies from making contracts of

⁴² *Star of Hope*, 9 Wall. 203, 237 (19:638); *Ralli v. Troop*, 157 U. S. 386, 428 (39:742); *The Irrawaddy*, 171 U. S. 187 (43:130); *McAndrews v. Thatcher*, 3 Wall. 365 (18:159); *Barnard v. Adams*, 10 How. 270 (13:417).

⁴³ *Star of Hope*, 9 Wall. 203, 237 (19:638); *Ralli v. Troop*, 157 U. S.

386, 428 (39:742); *The Irrawaddy*, 171 U. S. 187 (43:130).

⁴⁴ *Barnard v. Adams*, 10 How. 270 (13:417); *Insurance Co. v. Ashby*, 13 Pet. 331 (13:186).

⁴⁵ *De Lovio v. Bolt*, 2 Gall. 398, Fed. Cas. No. 3,776; *Insurance Co. v. Dunham*, 11 Wall. 1, 36 (11:90).

insurance, marine or otherwise, except upon such conditions as the state may prescribe, and, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, the state has the equal power to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties.⁴⁶

§ 577. **Jurisdiction of suits on maritime hypothecation.**—The master of a vessel of the United States, being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and the owners, personally, for repairs and supplies, and he does so without any express hypothecation, when, in a case of necessity, he obtains them on the credit of the vessel without a bottomry bond;⁴⁷ and in a case of urgent necessity, the master, acting in good faith, exercising his best discretion for the benefit of all concerned, and under compulsion of necessity, to be determined in each case by the actual and impending peril to which the vessel was exposed, may hypothecate the cargo.⁴⁸

The district courts of the United States have exclusive original jurisdiction of all suits in admiralty upon maritime hypothecations;⁴⁹ and “in all suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem* or against the master or owner *in personam*.”⁵⁰

§ 578. **Same—Bottomry bonds—Defined.**—Mr. Justice Story defined a bottomry bond as follows: “The true definition of a bottomry bond, in the sense of the general maritime law, and independent of the peculiar regulations of the positive codes of different commercial nations, is, that it is a contract for a loan of money on the bottom of the ship, at an extraordinary

⁴⁶ *Nutting v. Massachusetts*, 183 U. S. 553, 558 (46:324).

⁴⁷ *Thomas v. Osborn*, 19 How. 22, 56 (15:534).

⁴⁸ *The Julia Blake*, 107 U. S. 414, 433 (27:595).

⁴⁹ *The Grapeshot*, 9 Wall. 129, 145 (19:651); *The Lulu*, 10 Wall. 192, 204 (19:906); *Thomas v. Osborn*, 19 How. 22, 56 (15:534); *The Julia Blake*, 107 U. S. 414, 433 (27:595).

⁵⁰ Admiralty rule 17.

interest upon maritime risk, to be borne by the lender for a voyage, or for a definite period.”⁵¹

Mr. Chief Justice Chase, delivering the opinion of the supreme court in a suit brought upon an instrument of that character, said: “A bottomry bond is an obligation, executed, generally, in a foreign port, by the master of a vessel for payment of advances to supply the necessities of the ship, together with such interest as may be agreed on, which bond creates a lien on the ship which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void and of no effect in case of her loss before arrival. Such a bond carries usually a high rate of interest, to cover the risk of loss of the ship as well as a liberal indemnity for other risks and for the use of the money, and will bind the ship only where the necessity for supplies and repairs, in order to the performance of a contemplated voyage, is a real necessity, and neither the master nor owners have funds or credit available to meet the wants of the vessel. Some bonds, bearing only the ordinary rate of interest, or executed under circumstances more or less different from those just stated, are called bottomry bonds, and are enforced as such; but the general description just given embraces most instruments known under that name, and is sufficiently accurate for the case presented by the record.”⁵²

An admiralty rule provides that: “In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter case the suit may be *in personam* against the wrongdoer.”⁵³

§ 579. **Same—Respondentia bonds.**—A *respondentia* bond is an hypothecation of the cargo, and is—*mutatis mutandis*—substantially the same as a bottomry bond;⁵⁴ but the limitations

⁵¹ The *Draco*, 2 Sumn. 157, Fed. Cas. No. 4,057.

⁵³ Admiralty rule 18.

⁵² The *Grapeshot*, 9 Wall. 129, 145 (19:651).

⁵⁴ *Conrad v. Atlantic Ins. Co.*, 1

Pet. 386 (7:189).

upon the authority of the master is applied with greater strictness in the execution of the former than in the latter.⁵⁵ The exclusive original jurisdiction of suits upon these bonds in admiralty is vested in the district courts.⁵⁶

§ 580. **Jurisdiction of suits on affreightment contracts.**—All contracts of whatever character, and whether in writing or resting in parol, for the transportation of property by vessels upon navigable waters are, by the maritime law of this country, maritime contracts, and the district courts of the United States are vested with exclusive original jurisdiction of suits in admiralty, both *in rem* and *in personam*, founded on such contracts,⁵⁷ and this is true although the port of shipment and the port of destination are within the same state.⁵⁸

§ 580a. **Jurisdiction of suits on contracts for the transportation of persons.**—By our maritime law, contracts for the transportation of persons are maritime contracts, and the jurisdiction of suits upon them in admiralty is vested exclusively in the district courts of the United States.⁵⁹

§ 581. **Jurisdiction of suit based on charter-party.**—By the maritime code of the United States, a charter-party, which is a contract by which the owner lets and hires his ship or some portion of it to another,⁶⁰ is a maritime contract, and the district courts of the United States are vested with exclusive original jurisdiction of all suits in admiralty, both *in rem* and *in personam*, based on such instruments.⁶¹

§ 582. **Demurrage.**—Demurrage, which is an allowance or compensation for the delay or detention of a vessel, and which may arise either *ex delicto* or *ex contractu*, is within the exclusive admiralty jurisdiction of the district courts.⁶²

⁵⁵ *The Julia Blake*, 107 U. S. 418, 433 (29:595).

⁵⁶ *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386 (7:189).

⁵⁷ *The New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344 (12:465).

⁵⁸ *The Belfast*, 7 Wall. 624, 646 (19:266).

⁵⁹ *The Moses Taylor*, 4 Wall. 555 (18:451).

⁶⁰ 1 Parsons on Shipping and Admiralty, 274–299.

⁶¹ *Morewood v. Enequist*, 23 How. 491, 495 (16:516).

⁶² *The Appollon*, 9 Wheat. 362 (6:111); *The Conqueror*, 166 U. S. 110, 136 (41:937); *The Potomac v. Cannon*, 105 U. S. 630, 636 (26:1194); *United States v. The Nuestra Senora De Regla*, 108 U. S. 92, 104 (27:662). “The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court

§ 583. **Stevedores.**—It has been held by some of the inferior federal courts, that the services of stevedores, who are skilled laborers engaged in stowing and discharging cargoes, are maritime in their character, and within the admiralty jurisdiction of the district courts;⁶³ but the question has never been decided by the supreme court.

§ 584. **Wharfage.**—Contracts for wharfage are maritime, and within the exclusive admiralty jurisdiction of the district courts. If the vessel contracting for the use of the wharf be a foreign one, or belongs to a state other than the one in which the wharf is situated, a maritime lien arises in favor of the proprietor of the wharf against the vessel, which can be enforced only by a suit *in rem* in the district court sitting in admiralty.⁶⁴

§ 585. **Lighterage.**—It seems that the services of lighters in loading and unloading ships are maritime, and within the admiralty jurisdiction.⁶⁵

§ 586. **Consortship.**—An agreement between the owners of two vessels, known as “wreckers,” that the vessels owned by them, respectively, shall act as consorts with each other in salvage service, and share mutually with each other in the moneys awarded as salvage, whether earned by one vessel or both, is a maritime contract and may be enforced in admiralty against property or its proceeds in the custody of the court.⁶⁶

§ 587. **Jurisdiction of petitory and possessory suits.**—The district courts have exclusive original jurisdiction of all petitory and possessory suits in admiralty. The court is vested with plenary jurisdiction of all questions of title and possession of ships and other vessels used in navigation.⁶⁷

may, in case of restitution, decree demurrage against him as damages. This rule is well settled.” Chief Justice Waite in *United States v. The Nuestra Senora De Regla*, *supra*.

⁶³ *The George T. Kemp*, 2 Lowell, 477, Fed. Cas. No. 5,341; *The Seguranca*, 58 Fed. R. 908; *The Gilbert Knapp*, 37 Fed. R. 209; *The Magnolia*, 37 Fed. R. 367, *The Mattie May*, 45 Fed. R. 899; *The Main*, 51 Fed. R. 954; *Roberts v. The*

Bark Windermere, 2 Fed. R. 722; *The Ivanhoe*, 26 Fed. R. 927.

⁶⁴ *Ex parte Easton*, 95 U. S. 68, 78 (24:373); *The Dora Mathews*, 31 Fed. R. 620.

⁶⁵ 1 *Parsons on Shipping and Admiralty*, 230, 237, 238; *Thackarey v. The Farmer*, Gilp. 526.

⁶⁶ *Andrews v. Wall*, 3 How. 368 (11:729).

⁶⁷ Admiralty rule 20; *Ward v. Peck*, 18 How. 267, 271 (15:383); *New England Ins. Co. v. Brig*

§ 588. **Jurisdiction of suits for damages by collision.**—The district courts of the United States are vested with exclusive original jurisdiction of all suits in admiralty for damages caused by a collision between two ships or other vessels engaged in navigation and commerce;⁶⁸ and in such suits, “the libelant may proceed against the ship and master, or against the ship alone, or against the master or owner alone *in personam*.”⁶⁹

§ 589. **Same—Collision *infra corpus comitatus*.**—At the time of the adoption of the federal constitution, the English admiralty had no jurisdiction of a suit for damages based on a collision occurring within the body of a county, and it was at first strenuously insisted that the same limitation should be imposed upon the admiralty jurisdiction of the United States courts; but the English rule was rejected, and the doctrine established that the fact that the collision may have occurred within the body of a county is wholly immaterial to the exercise of jurisdiction over the cause of action.^{69a}

§ 590. **Same—Venue of suits for damages by collision.**—While the rule is fundamental that jurisdiction in admiralty, in cases of tort, depends upon locality, the rule does not require that the suit shall be brought in the district where the tort occurred. The cause of action in such case is transitory. Marine torts are in the nature of trespasses upon the person or upon personal property, and they may be prosecuted *in personam* in any district where the offending party resides, or *in rem* wherever the offending thing is found to be within the jurisdiction of the court issuing the process.⁷⁰

§ 591. **Same—Concurrent common-law remedy for damage by collision.**—There has always been a remedy at common law for damages by collision at sea;⁷¹ and the action is one of trespass *vi et armis* or trespass on the case, according to the circumstances.⁷²

Sarah Anne, 13 Pet. 387 (10:213);
The Tilton, 5 Mason, 465.

⁶⁸ The Hine v. Trevor, 4 Wall. 555 (18:451).

⁶⁹ Admiralty rule 15.

^{69a} Waring v. Clark, 5 How. 441 (12:226); The Magnolia, 20 How. 296 (15:909); The Propeller Commerce, 1 Black, 574 (17:107); Nelson v. Leland, 22 How. 48 (16:269).

⁷⁰ The Propeller Commerce, 1 Black, 574 (17:107); Nelson v. Leland, 22 How. 48 (16:269).

⁷¹ Schoonmaker v. Gilmore, 102 U. S. 118, 119 (26:95); Billings v. Breining, 45 Mich. 69, 7 N. W. 722.

⁷² Percival v. Hickey, 18 Johns. 257, Book 6, Law Ed. 579.

§ 592. **Jurisdiction of suits for damages to vessel caused by obstructions negligently left in navigable waters.**—Marine torts, as defined and understood in the maritime law, are not confined to injuries committed by direct force, but also include wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. “It is a rule of the maritime law, from the earliest times, ‘that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages;’” and it is an established principle of the maritime code of the United States that if any person or corporation shall negligently place or leave any obstruction in any navigable waters, whereby a ship or vessel is injured, the person or corporation guilty of such negligent obstruction may be compelled to respond in damages by suit in admiralty, and of such suit the district courts have exclusive original jurisdiction, saving, however, the concurrent common-law remedy of a special action on the case.⁷³

§ 593. **Jurisdiction of libel in rem against vessel for negligent destruction of beacon.**—The supreme court has recently held that the district court in admiralty has jurisdiction *in rem* of a libel against a British vessel for negligently colliding with and destroying a beacon, erected, as an aid to navigation, by the government, fifteen or twenty feet from the channel of Mobile bay, in water twelve to fifteen feet deep, built on piles driven firmly into the bottom, and thus attached to realty and being a part of it. In deciding the case, the court said: “It is enough to say that we are now dealing with an injury to a government aid to navigation from ancient times subject to the admiralty—a beacon emerging from the water—injured by the motion of a vessel, by a continuous act, beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea.”⁷⁴

⁷³ The Philadelphia, Wilmington & Baltimore Railroad Co. v. The Philadelphia & Havre De Grace Steam Towboat Co., 23 How. 209, 220 (16:433); Atlee v. Northwestern Packet Co., 21 Wall. 389 (22:

619); Panama Railroad Co. v. Napier Shipping Co., 166 U. S. 280, 290 (41:1004).

⁷⁴ The Blackheath, 195 U. S. 361, 369 (49:236).

§ 594. **Jurisdiction of suits for assault and battery.**—The district court has exclusive original jurisdiction of suits in admiralty for assaults and batteries upon the high seas and other navigable waters,⁷⁵ but such suits shall be *in personam* only.⁷⁶

§ 595. **Action for marine tort resulting in death.**—It is within the legal competency of the several states to enact statutes giving an action at law for marine torts resulting in death, and to confer jurisdiction of such actions upon their own courts, where the tort occurs upon either the high seas or the navigable waters within the territorial limits of the states, each, respectively. The fact that admiralty may take cognizance of such causes does not bar the action at law. Suitors may have a common-law remedy in all cases where the common law is competent to give it, and the operation of the saving clause of the statute conferring admiralty jurisdiction on the federal courts is not limited to such causes of action as were known to the common law at the time of the passage of the original judiciary act. In such cases, the plaintiff may resort to his common-law remedy in the state courts, or in the circuit courts of the United States where the character of the parties and the amount involved are such as to give the circuit court jurisdiction.⁷⁷

§ 596. **Same—Jurisdiction in admiralty under state statute.** It seems that the following propositions are now regarded as settled, namely: (1) That at the common law no civil action would lie for an injury resulting in death; (2) that, in the absence of proper legislation, no proceeding in admiralty will lie for negligent injury causing death on the high seas or the navigable waters of the United States; (3) that, in the absence of legislation by congress, if a state statute gives a right of action touching the subject of a maritime nature, the admiralty will administer the law within the jurisdiction of such state by a proceeding *in rem* if the statute grants a lien, or *in personam*, no lien being granted.⁷⁸

⁷⁵ Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575; Plummer v. Webb, 4 Mason, 380, Fed. Cas. No. 11,234.

⁷⁶ Admiralty rule 16.

⁷⁷ Steamboat Co. v. Chase, 16 Wall. 522, 535 (21:369); Sherlock v. Alling, 93 U. S. 99, 108 (23:819); Old Dominion S. S. Co. v. Gilmore, 207 U. S. 398 (52:—), affirming 77 C. C. A. 150.

⁷⁸ The Onoko, 47 C. C. A. 111, 107 Fed. R. 984; Bigelow v. Nickerson, 17 C. C. A. 1, 70 Fed. R. 113, 30 L. R. A. 336; The Corsair, 145 U. S. 335, 347 (36:727); The Albert Dumois, 177 U. S. 240, 259 (44:751); The Harrisburg, 119 U. S. 199 (30:358); Mobile L. Ins. Co. v. Brame, 95 U. S. 754 (24:580); Old Dominion S. S. Co. v. Gilmore, 207 U. S. 398 (52:—) affirming 77 C. C. A. 150.

§ 597. Jurisdiction of suits under the limited liability act.—The district courts of the United States, as courts of admiralty, are vested with exclusive original jurisdiction of all suits and proceedings under what is known as the “limited liability act,” limiting the liability of shipowners, under certain circumstances, to the value of their interest in the vessel and pending freight, and have, as courts of admiralty, plenary power to entertain and carry on all proper proceedings for the due execution and beneficial administration of the law in all its details; and, in the exercise of that jurisdiction, they may restrain the prosecution of any and all suits in either the state courts or other federal courts, whenever it may be necessary to a due and orderly administration of the law, a sale of the property, a disbursement of the fund, and the protection of the parties concerned.⁷⁹

§ 598. Jurisdiction of maritime seizures.—The federal district courts, as courts of admiralty, are vested with exclusive original jurisdiction of all suits prosecuted for the forfeiture and condemnation of vessels seized upon navigable waters for the violation of the laws of impost, navigation and trade or any other law of the United States;⁸⁰ except, however, the district courts and circuit courts have concurrent original jurisdiction of seizures made under the laws relating to the slave trade,

⁷⁹ *Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104, 127 (20:585); *Butler v. Steamship Co.*, 130 U. S. 527, 558 (32:1017); *The Scotland*, 105 U. S. 24, 36 (26:1001); *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 593 (27:1038); *Ex parte Garnett*, 141 U. S. 1, 18 (35:631); *The Albert Dumois*, 177 U. S. 240, 259 (44:751); Admiralty rules 54, 55, 56, 57; U. S. Rev. Stat. secs. 4281–4289; 23 U. S. Stat. at L. ch. 121, sec. 18, p. 57; 3 U. S. Comp. Stat. 1901, pp. 2942–2945; 4 Fed. Stat. Anno. pp. 837–854, with notes collecting the decisions under the act.

⁸⁰ Sec. 734, U. S. Rev. Stat.; 3 Fed. Stat. Anno. p. 95; *Glass v. The Betsey*, 3 Dal. 6 (1:485); *Uni-*

ted States v. The Betsey and Charlotte, 4 Cranch, 443 (2:673); *Whe-
lan v. United States*, 7 Cranch, 112 (3:286); *The Samuel*, 1 Wheat. 9 (4:23); *Gelston v. Hoyt*, 3 Wheat. 246 (4:387); *The Merino*, 9 Wheat. 391 (6:118); *The Palmyra*, 12 Wheat. 1 (6:531); *Novion v. Hal-
lett*, 16 Johns. 343; *The Brig Ann*, 9 Cranch, 289 (3:734); *United States v. The Schooner Sally*, 2 Cranch, 406 (2:320); *United States v. La Vengeance*, 3 Dal. 297 (1:610); *United States v. The Three Friends*, 166 U. S. 1, 83 (41:897); *Brig Kate*, 2 Wall. 350, 356 (17:878); *The Sarah*, 2 Wall. 366 (17:906); *The Bark Reindeer*, 2 Wall. 383, 403 (17:911).

and seizures made under section fifty-three hundred and eight of the Revised Statutes.⁸¹

§ 599. **Same—Seizure necessary to vest jurisdiction.**—In such cases, seizure is necessary to give the court jurisdiction, and the seizure must be made before the libel is filed. In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so, when, by seizure, it is held to ascertain and enforce a right of forfeiture which can alone be decided by a judicial decree *in rem*. There must be a subsisting seizure at the time when the libel is filed.⁸² The seizure being jurisdictional, the absence from the libel of an appropriate allegation of seizure may be taken advantage of at any time.⁸³

§ 600. **Same—Venue of suits to forfeit and condemn seizures.** The jurisdiction in such cases is given to the court of the district, not where the offense is committed, but where the seizure is made, or where it is carried. If the property be seized within the territorial limits of the United States, the district court of the district where the seizure is made has jurisdiction; but if the seizure be made upon the high seas or within the territory of a foreign power, the jurisdiction may be exercised by the district court of any district into which the property seized is brought and proceedings instituted.⁸⁴

§ 601. **Jurisdiction of suits for the restitution of vessels illegally seized.**—The district courts, as courts of admiralty, have and exercise exclusive original jurisdiction of all suits for the restitution of vessels and other property illegally seized upon the high seas or the navigable waters of the United States or navigable waters within the territory of a foreign power, whether such illegal seizure be made under color of the laws of the United States,⁸⁵ or as prize *jure belli*.⁸⁶

⁸¹ U. S. Rev. Stat. sec. 563, cl. 8, sec. 629, cl. 6 and 7

⁸² *The Brig Ann*, 9 Cranch, 289 (3:734).

⁸³ *The Washington*, 4 Blackf. 101, 103, Fed. Cas. No. 17,221.

⁸⁴ U. S. Rev. Stat. sec. 734; 3 Fed. Stat. Anno. p. 95; *The Merino*, 9 Wheat. 391 (6:118).

⁸⁵ *Ex parte Fassett*, 142 U. S. 479 (35:1087); *The Conqueror*, 166 U. S. 110, 136 (41:937); *Yeaton v. United States*, 2 Cranch, 281 (3:101); *Rose v. Himley*, 4 Cranch, 241 (2:608).

⁸⁶ *Glass v. The Betsey*, 3 Dal. 6 (1:485).

§ 602. **Jurisdiction of prize jure belli.**—The district courts are vested with exclusive original jurisdiction in admiralty of all suits prosecuted for the adjudication of the question of prize or no prize in captures *jure belli*, and to entertain all claims and proceedings and to make all orders and decrees which may be necessary for the just and lawful disposition of the property, including restitution where the seizure is illegally made;⁸⁷ except, however, proceedings under section fifty-three hundred and eight of the Revised Statutes, in which the circuit and district courts have concurrent jurisdiction.⁸⁸

§ 603. **Venue of suits in admiralty.**—The provision of the federal judiciary act requiring suit to be brought in the district whereof the defendant is an inhabitant has no application to causes of admiralty and maritime jurisdiction. By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, whenever a monition can be served on the libelee, or an attachment made of any personal property or credits of his; and this practice has been recognized and upheld by the rules and decisions of the supreme court, and is controlling in all the courts of admiralty jurisdiction in the federal system.⁸⁹

Suits *in rem*, the invariable purpose of which is, either to enforce a maritime lien upon specific property, or to forfeit and condemn specific property, or to recover the title or possession of specific property, or to surrender specific property

⁸⁷ *Bingham v. Cabbot*, 3 Dall. 19 (1:491); *The Amiable Nancy*, 3 Wheat. 546 (4:456); *Glass v. The Betsey*, 3 Dall. 6 (1:485); *Jennings v. Carson*, 4 Cranch, 2 (2:531); *Hudson v. Guestier*, 4 Cranch, 293 (2:625); *The Estrella*, 4 Wheat. 298 (4:574); *The Siren*, 7 Wall. 152 (19:129); *Prize Cases*, 2 Black, 635 (17:459); *Jecker v. Montgomery*, 18 How. 110 (15:311); *Penhallow v. Doane*, 3 Dall. 54 (1:507); *Jecker v. Montgomery*, 13 How. 498 (14:240); *The Alerta v. Moran*, 9 Cranch. 359 (3:758); *The Santissima Trinidad*, 7 Wheat. 283

(5:454); *M'Donough v. Dannery*, 3 Dall. 188 (1:563).

⁸⁸ U. S. Rev Stat. sec. 563, cl. 9, sec. 629, cl. 6; 4 Fed. Stat. Anno. pp. 234 and 249.

⁸⁹ *Ex parte Louisville Underwriters*, 134 U. S. 488, 494 (33:991); *Manro v. Almeida*, 10 Wheat. 473 (6:369); *Atkins v. Disintegrating Co.*, 18 Wall. 272 (21:841); *Ins. Co. v. Steam Navigation Co.*, 18 Wall. 307 (21:846); *Cushing v. Laird*, 107 U. S. 69 (27:391); *Devoe Mfg. Co., Petitioner*, 108 U. S. 401 (27:764); Admiralty rules 2, 57.

to creditors and claimants under the limited liability act, must be commenced and prosecuted in the district where the property is found.⁹⁰

§ 604. **Same—Interventions.**—Interventions *pro interesse suo*, to claim proceeds in the registry of the court, or to assert liens on property which has, in suits *in rem*, been arrested, must, as a matter of course, be filed in the court where the original suit was brought, and in the very suit itself.⁹¹ Courts of admiralty, under the forty-third rule, have the power to distribute surplus proceeds to all persons who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated.⁹²

⁹⁰ *The Propeller Commerce*, 1 Black, 574 (17:107); *Nelson v. Leland*, 22 How. 296 (15:909); *The Reindeer*, 2 Wall. 403 (17:915); *The Steamboat Cheesman v. Two Ferry Boats*, 2 Bond, 369, Fed. Cas. No. 2,633; *Town v. The Western Metropolis*, 24 Fed. Cas. 93; *The Hungaria*, 41 Fed. R. 112; *The*

Merino, 9 Wheat. 391 (6:118), U. S. Rev. Stat. sec. 734, 3 Fed. Stat. Anno. p. 95; Admiralty rules 9, 22, 23, 57.

⁹¹ Admiralty rules 34, 43; *The Lottawana*, 21 Wall. 558, 609 (22:654).

⁹² *The Lottawana*, 21 Wall. 558, 609 (22:654).

CHAPTER XIV.

THE COMMON-LAW AND EQUITY JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

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| <p>§ 605. District courts are courts of common law, equity and admiralty.</p> <p>606. District courts are government courts.</p> <p>607. Statutes defining the jurisdiction of the district courts.</p> <p>608. Same—Additional legislation—Revised Statutes.</p> <p>609. Criminal jurisdiction of the district courts.</p> <p>610. The district courts have no common-law jurisdiction of crimes.</p> <p>611. Suits for penalties and forfeitures.</p> <p>612. Same—Action of debt for pecuniary penalty.</p> <p>613. Same — Exclusive jurisdiction of the district courts as to penalties incurred under the custom laws.</p> <p>614. Same—Actions for penalties under federal statutes prohibiting importation of foreigners under contract to labor.</p> <p>615. Suits at common law by the United States or officers thereof.</p> <p>616. Same—Suits by receivers of national banks.</p> <p>617. Same — Same — Jurisdiction to order receivers to sell or compound debts, and sell real and personal property.</p> | <p>§ 618. Same—Action of debt on postmaster's bond.</p> <p>619. Suits in equity to enforce internal revenue tax liens.</p> <p>620. Suits for penalties and damages for frauds against the United States.</p> <p>621. Suits arising under the postal laws.</p> <p>622. Same—Suits in equity to set aside fraudulent conveyances.</p> <p>623. Jurisdiction of seizures on land and waters not navigable.</p> <p>624. Condemnation of property used in aid of insurrection.</p> <p>625. Suits by assignees of debentures,</p> <p>626. Suits for injuries resulting from conspiracies in violation of the "civil rights" act.</p> <p>627. Same — Certain provisions of the "civil rights" legislation declared unconstitutional.</p> <p>628. Suits to redress deprivation of rights secured by constitution and laws of the United States.</p> <p>629. Suits brought by aliens for torts in violation of the laws of nations or treaties.</p> |
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§ 630. Same—When the original act may be looked to in aid of construction.

631. Suits against consuls and vice-consuls.

632. Suits against the government under "the Tucker Act."

633. Same—Set-offs and counterclaims.

634. Same—Limitation of suits—Six years.

635. Same—Cases "sounding in tort" excluded by "the Tucker Act."

636. Same—Four classes of cases contemplated by "the Tucker Act."

637. Same—Same—Implied contracts

638. Same—Suits by marshal to recover disbursements made to pay court bailiffs.

639. Same—Suit for salvage when the government is benefited by the salvage service.

640. Jurisdiction of judicial proceedings by the federal government to condemn private property for public use.

641. Same—A proceeding to condemn private property for public use is a suit at common law.

642. Jurisdiction of suits under

the act to prevent unlawful occupancy of the public lands.

§ 643. Jurisdiction of actions for damages under the interstate commerce act.

644. Jurisdiction to issue writs of mandamus to compel equal facilities to shippers.

645. Same—Foundation of the right to the writ of mandamus.

646. Same—Same—Purposes of the interstate commerce act.

647. Same—Plea in abatement—Former suit pending.

648. Same—Increased jurisdiction of the district courts by the last amendment to the act.

649. Seizure and destruction of obscene books, pictures and other articles imported from foreign countries in violation of law.

650. Jurisdiction of actions to recover penalties for violations of the Safety Appliances Act.

651. Jurisdiction of suits pending in territorial courts upon admission of the territory as a state.

652. All issues of fact in actions at law tried by jury.

§ 605. District courts are courts of common law, equity and admiralty.—By the acts of congress constituting the judicial system of the United States, and vesting the judicial power of the government, the district courts are made courts of common law, and equity, and admiralty and maritime jurisdiction, and in all cases at common law the trial is by jury, and in all cases of equity, and admiralty and maritime jurisdiction, the trial is by the court without the intervention of a jury; and although

the three jurisdictions are vested in the same tribunal they are as distinct from each other as if they were vested in different tribunals, and cannot be blended, but the remedies common to each jurisdiction must be separately pursued.¹

§ 606. **District courts are government courts.**—The district courts occupy, in the federal judicial system, the position of government courts, having and exercising jurisdiction of crimes against the government, and also of civil actions touching the public revenues, and for penalties and forfeitures, and of seizures, arising out of the customs and revenue laws;² and in their jurisdiction in the latter respect they bear a strong analogy to the English exchequer.³

¹ 1 U. S. Stat. at L. ch. 9, pp. 73-79; U. S. Rev. Stat. secs. 563, 566, 3207; *The Sarah*, 8 Wheat. 391, 296 (5:644); *Ex parte Phillips*, 101 U. S. — (25:781).

² U. S. Rev. Stat. sec. 563; 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73-79; *Matthews v. Offley*, 3 Sumn. 115, Fed. Cas. 9,290.

³ 2 Chitty's Prac. 314, 315, 316, 389-402, 450, 451.

"The court of exchequer, as originally constituted, was a court of record merely for the hearing and determining of matters relating to the *revenue* of the crown; and in many respects revenue questions must exclusively be heard and determined either on the common-law or equity side of this court and not in chancery; and hence it is supposed by other courts that this court is *more eligible* for the decisions upon revenue questions, and may be so, subject to the possibility of bias in favor of the crown. The exchequer was originally divided into eight courts—as: the court of pleas (still the proper law court). * * * The first specified court, viz: the court of pleas, is the exchequer

court of law, and was properly and anciently the court in which debts or duties to the king were to be recovered, usually by *information* by the attorney-general, and actions by and against the officers of this court, and the king's actual debtors, and against actual prisoners in the Fleet prison of the court, were always sustainable in this court. Magna Charta prohibited real, mixed and personal actions to be brought elsewhere than in the common pleas, and the statute of Rutland, 10 Ed. I., in affirmance, as is said, of the common law, enacted that 'no plea shall be held in the exchequer unless it specially concern the king or his ministers. * * * Anciently equity suits could only be instituted in this court in revenue matters, and when a party was a debtor to the crown, or was a clergyman bound to pay to the king his first fruits and annual tenths.' 2 Chitty's Prac. 389, 390, 391, 450, 451, *supra*."

In *Matthews v. Offley*, 3 Sumn. 115, Fed. Cas. 9,290, *supra*, Story, justice, said:

"Upon general principles, where

§ 607. **Statutes defining the jurisdiction of the district courts.**—The jurisdiction of the district courts was first defined by the ninth section of the original judiciary act,⁴ and it has, since its enactment, continued to be the basis of that jurisdiction, down to the present time.⁵ That section is as follows:

“Sec. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also

a pecuniary penalty or forfeiture is inflicted for any public offense or wrong, it seems clear that the action to recover the penalty or forfeiture must be brought in the name of the government, and not in the name of a private party, unless some other mode for the recovery is prescribed by the statute; and the usual remedy of a pecuniary penalty is an action or information of debt by the government itself. This is the rule of the common law; therefore, it

has been held, that a suit will not lie by a common informer for such a penalty, unless also specially allowed by statute, for it is properly recoverable as a debt in a court of revenue by the government, and is in no just sense a criminal proceeding.”

⁴ 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73-79.

⁵ United States v. Mooney, 116 U. S. 104 (29:550); Lees v. United States, 150 U. S. 476, 478 (37:

have cognizance, concurrent as last mentioned, of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury."

§ 608. Same—Additional legislation—Revised statutes.—Prior to the last authoritative revision of the federal statutes, running through the whole period from the organization of the government down to the time of the revision, there was a great mass of federal legislation affecting the jurisdiction of the district courts, all of which was carried into the revised statutes, and an attempt was made to enumerate and state in one section⁶ all the different subjects of which those courts have cognizance; and since the revision there has been additional legislation, vesting jurisdiction in the district courts, and it is the purpose of this chapter to state succinctly the various heads of this jurisdiction, with a reference to the principal statutes and leading decisions.

§ 609. Criminal jurisdiction of the district courts.—The district courts have original jurisdiction (1) of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, title "crimes;"⁷ and (2) of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.⁸

§ 610. The district courts have no common-law jurisdiction of crimes.—It is well settled that there are no common-law

1150); *Helwig v. United States*, 188 U. S. 605, 619 (47:614); *The Cassius*, 2 Dall. 365 (1:417); *Evans v. Bollen*, 4 Dall. 342 (1:859).

⁶ U. S. Rev. Stat. 563, 4 Fed. Stat. Anno. 218-236; U. S. Comp. Stat. 1901, pp. 455-460.

⁷ U. S. Rev. Stat. sec. 563, cl. 1; U. S. Comp. Stat. 1901, 455, 456; 4 Fed. Stat. Anno. 218, 219.

⁸ U. S. Rev. Stat. sec. 563, cl. 2; U. S. Comp. Stat. 1901, 456; 4 Fed. Stat. Anno. 219.

offenses against the United States; the criminal jurisdiction of the courts of the United States is wholly derived from federal legislation; it devolves upon congress to define what are crimes against the general government, to fix the proper punishment, and to confer jurisdiction for their trial, and the execution of the judgments rendered upon such trial.⁹

§ 611. **Suits for penalties and forfeitures.**—The district courts have original jurisdiction of all suits for the recovery of penalties and forfeitures incurred under any law of the United States.¹⁰

§ 612. **Same—Action of debt for pecuniary penalty.**—The proper form of action for pecuniary penalties and forfeitures incurred under the federal statutes is a civil action or information of debt, brought in the name of the United States, and that is the form of action adopted at an early day and followed in the district courts for such penalties and forfeitures.¹¹ The action of debt lies whenever a sum certain is due the plaintiff from the defendant, or a sum which can readily be rendered

⁹ U. S. v. Hudson, 7 Cranch, 32 (3:259); U. S. v. Eaton, 144 U. S. 677, 688 (36:591); U. S. v. Coolidge, 1 Wheat. 415 (4:124); U. S. v. Britton, 108 U. S. 199, 206 (27:698, 700); Manchester v. Massachusetts, 139 U. S. 240, 263 (35:159); Jones v. U. S., 137 U. S. 202, 211 (34:691, 695); Peters v. U. S., 36 C. C. A. 107, 109; U. S. v. Walsh, 5 Dill. 60, Fed. Cas. 16,636; U. S. v. Martin, 4 Cliff. 157, Fed. Cas. 15,728; In re Greene, 52 Fed. R. 104; U. S. v. Lewis, 36 Fed. R. 449; U. S. v. Bevans, 3 Wheat. 337, 391 (4:404); U. S. v. Wilteberger, 5 Wheat. 76 (5:37).

¹⁰ U. S. Rev. Stat. sec. 563, cl. 3; U. S. v. Brougher, 6 McLean, 277, Fed. Cas. 14,627; U. S. v. Willetts, 5 Ben. 220, Fed. Cas. 16,699; Matthews v. Offley, 3 Sumn. 115, Fed. Cas. 9,290; U. S. v. Colt, Pet. (C. C.) 145, Fed. Cas. 14,839; The Nashville, 4 Biss. 188, Fed. Cas. 10,023; Adams v. Woods, 2

Cranch, 336 (2:297); Ex parte Marquand, 2 Gall. 552, Fed. Cas. 9,100; Rosenberg v. Union Iron Works, 109 Fed. R. 844; Lees v. U. S., 150 U. S. 476 (37:1150); U. S. v. Mooney, 11 Fed. R. 476; U. S. v. Mooney, 116 U. S. 106 (29:550); Helwig v. U. S., 188 U. S. 605 (47:614); U. S. v. Whitcombe Metallic Bedstead Co., 45 Fed. R. 44; U. S. v. Mexican National Ry. Co., 40 Fed. R. 769; In re Rosey, 6 Ben. 507, Fed. Cas. 12,066; Jacobs v. U. S., 1 Brock. 520, Fed. Cas. 7,157.

¹¹ Matthews v. Offley, 3 Sumn. 115, Fed. Cas. 9,290; U. S. v. Colt, Pet. (C. C.) 145, Fed. Cas. 14,839; In re Rosey, 6 Ben. 507, Fed. Cas. 12,066; Jacobs v. U. S., 1 Brock. 520, Fed. Cas. 7,157; The Nashville, 4 Biss. 188, Fed. Cas. 10,023; U. S. v. Willetts, 5 Ben. 220, Fed. Cas. 11,699; Chaffee v. U. S., 18 Wall. 561 (21:908).

certain—a sum requiring no future valuation to settle the amount. It is not necessarily founded on a contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being readily and definitely ascertained.¹²

§ 613. Same—Exclusive jurisdiction of the district courts as to penalties incurred under the custom laws.—The district courts of the United States have original exclusive jurisdiction of all civil actions or informations of debt to recover pecuniary penalties for violations of the custom laws of the United States, the circuit courts having no jurisdiction in that class of cases.¹³

§ 614. Same—Actions for penalties under federal statutes prohibiting importation of foreigners under contract to labor. The district courts are vested with jurisdiction of civil actions of debt for the recovery of pecuniary penalties imposed for violations of the federal statutes prohibiting the importation or migration of foreigners and aliens into the United States under promise or agreement to perform labor or service of any kind, skilled or unskilled, in the United States;¹⁴ and, by the last act on the subject, the circuit courts are invested with full concurrent jurisdiction with the district courts in all causes, criminal and civil, arising under the provisions of the act.¹⁵

§ 615. Suits at common law by the United States or officers thereof.—The district courts have original jurisdiction, concurrent with the circuit courts, of all suits at common law,

¹² U. S. v. Colt, Pet. (C. C.) 145, Fed. Cas. 14,839; Stockwell v. U. S., 13 Wall. 531, 568 (20:491); Chaffee v. U. S., 18 Wall. 561 (21:908).

¹³ U. S. v. Mooney, 11 Fed. R. 476; U. S. v. Mooney, 116 U. S. 106 (29:550); Helwig v. U. S., 188 U. S. 605 (47:614).

¹⁴ 23 U. S. Stat. at L. ch. 164, pp. 332, 333; 24 U. S. Stat. at L. ch. 220, pp. 414, 415; 25 U. S. Stat. at L. ch. 1210, sec. 1, pp. 566, 567; 26 U. S. Stat. at L. ch. 551, pp. 1084–1086; 27 U. S. Stat. at L. ch. 206, pp. 569–571; 32 U. S. Stat. at L. part 1, ch. 1012, secs. 1, 2,

3, 4, 5, 6, 7, 8, 9, 29, pp. 1213–1222; 3 Fed. Stat. Anno. 298–307; U. S. Comp. Stat. Supplement 1905, pp. 274–289; Lees v. United States, 150 U. S. 476 (37:1150); Rosenberg v. Union Iron Works, 109 Fed. R. 844; United States v. Whitcomb Metallic Bedstead Co., 45 Fed. R. 44; United States v. Mexican National Ry. Co., 40 Fed. R. 769; U. S. Rev. Stat. sec. 563, cl. 3; 4 Fed. Stat. Anno. 219; U. S. Comp. Stat. 1901, p. 456.

¹⁵ 32 U. S. Stat. at L. part 1, ch. 1012, secs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 29, pp. 1213–1222.

brought by the United States, or any officer thereof, under the authority of any act of congress, authorizing them to sue, without regard to the amount in controversy.¹⁶

§ 616. **Same—Suits by receivers of national banks.**—Appointments of receivers of insolvent national banks, made by the comptroller of the currency, for the purpose of winding up the affairs of such banks, as provided by the national banking act, are presumed to be made with the concurrence and approval of the secretary of the treasury, and are made by the head of a department, within the meaning of the constitution; and the receiver, being appointed pursuant to an act of congress to execute duties prescribed by that act, is, in the execution of those duties, an agent and officer of the United States, and actions brought by him to recover assessments duly laid upon the stockholders, and necessary to provide for the payment of the debts of the bank, and actions to collect the assets of the bank from its delinquent debtors, are suits at common law brought by an officer of the United States, suing under the authority of an act of congress, of which the district and circuit courts have concurrent jurisdiction, without regard to the citizenship of the parties or the amount in controversy.¹⁷

¹⁶ U. S. Rev. Stat. sec. 563, cl. 4; 4 Fed. Stat. Anno. 220; U. S. Comp. Stat. 1901, p. 456; *Price v. Abbott*, 17 Fed. R. 506; *Hender v. Railroad Co.*, 26 Fed. R. 677; *Stephens v. Bernays*, 41 Fed. R. 401; *Frelinghuysen v. Baldwin*, 12 Fed. R. 395; *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Fisher v. Yoder*, 53 Fed. R. 565; *Myers v. Hittinger*, 94 Fed. R. 370; *Aldrich v. Campbell*, 97 Fed. R. 663; *Henry v. Sowles*, 28 Fed. R. 481; *Stanton v. Wilkinson*, 8 Ben. 377, Fed. Cas. 13,299; 3 U. S. Stat. at L. ch. 101, sec. 4, p. 1815; *Schofield v. Palmer*, 134 Fed. R. 573. Section 4 of the Act of March 3, 1815, 3 U. S. Stat. at L. ch. 101, p. 245, *supra*, is as follows: "That the district courts of the United States shall have cognizance con-

current with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under authority of any act of congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars."

¹⁷ *Price, Receiver, v. Abbott*, 17 Fed. R. 506; *Hendee, Receiver, v. R. Co.*, 26 Fed. R. 677; *Stephens v. Bernays*, 41 Fed. R. 481; *Frelinghuysen v. Baldwin*, 12 Fed. R. 395; *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Fisher v. Yoeder*, 53 Fed. R. 565; *Thompson v. Pool*, 70 Fed. R. 725, *Short v. Hepburn*, 75 Fed. R. 113; *Brown v. Smith*, 88 Fed. R. 565; *Meyers v. Hettlinger*, 94 Fed. R. 370; *Aldrich v.*

§ 617. ~~Same—Same~~—Jurisdiction to order receiver to sell or compound debts and sell real and personal property.—The national banking act declares that when a receiver has been appointed of an insolvent bank, “such receiver, under the direction of the comptroller shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct;”¹⁸ and the federal district court is a court of competent jurisdiction to make the orders mentioned in the statute.¹⁹

§ 618. ~~Same~~—Action of debt on postmaster’s bond.—The district courts have jurisdiction, concurrent with the circuit courts, of an action of debt brought by the postmaster-general, against the postmaster on his official bond.²⁰

§ 619. Suits in equity to enforce internal revenue tax liens. The federal statutes provide a scheme for the assessment and levy of the internal revenue tax,²¹ make such tax a lien upon all the property, real and personal, belonging to such persons as are liable to pay any such tax and neglect or refuse to pay the same after demand,²² and further provide that in any case where there has been a refusal or neglect to pay the tax, and it has become necessary to seize and sell real estate to satisfy the same, the commissioner of internal revenue may direct a bill in chancery to be filed in a district or circuit court of the United States, to enforce the lien of the United States for the taxes upon any real estate, or to subject any real estate owned

Campbell, 97 Fed. R. 663; Platt v. Beach, 2 Ben. 303, Fed. Cas. 11,215; Stanton v. Wilkeson, 8 Ben. 357, Fed. Cas. 13,299; Gibson v. Peters, 150 U. S. 342, 348 (37: 1104).

¹⁸ U. S. Rev. Stat. Sec. 5,234; Wallace v. Hood, 89 Fed. R. 11; Turner v. Richardson, 180 U. S. 87, 92 (45:438).

¹⁹ In re Platt, 1 Ben. 534, Fed. Cas. 11,211.

²⁰ Postmaster-General v. Early, 12 Wheat. 136 (6: 577); Dax v. Postmaster-General, 1 Pet. 323 (7:162); Postmaster-General v. Furber, 4 Mason, 333, Fed. Cas. 11,308; United States v. Green, 4 Mason, 434, Fed. Cas. 15,258.

²¹ U. S. Rev. Stat. secs. 3172–3185.

²² U. S. Rev. Stat. sec. 3186.

by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.²³ This statute, of course, vests in the district and circuit courts concurrent jurisdiction of such suits.²⁴

§ 620. Suits for penalties and damages for frauds against the United States.—It is provided by statute that any person, not in the military or naval forces of the United States, who shall make or cause to be made or presented any false, fictitious or fraudulent claim against the government, or shall use or cause to be used such claim, for the purpose of obtaining its payment or approval, knowing the same to be fraudulent, or who enters into any conspiracy to defraud the government, or who knowingly purchases or receives in pledge for any obligation or indebtedness from any person in the military or naval service, any arms, clothing, equipments, or other public property, such person not having the lawful right to sell the same, shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of such acts, together with the costs of suit, and the forfeiture and damages shall be sued for in the same suit;²⁵ and the district courts have jurisdiction of suits to recover such forfeitures, penalties and damages.²⁶

§ 621. Suits arising under the postal laws.—The district courts have jurisdiction, concurrent with the circuit courts of all actions, suits and causes arising under the postal laws of the United States.²⁷

§ 622. Same—Suits in equity to set aside fraudulent conveyances.—The district courts have jurisdiction, concurrent with the circuit courts, upon the direction of the department of justice, of bills in equity, to set aside fraudulent conveyances or trusts, and to exercise any other legitimate powers of a court of equity, for the purpose of obtaining satisfaction of any judgment for money due the post office department,

²³ U. S. Rev. Stat. sec. 3207; 3 Fed. Stat. Anno. 576–592. 5438; 2 Fed. Stat. Anno. 29, 30, 31.

²⁴ U. S. Rev. Stat. sec. 563, cl. 5; ²⁶ U. S. Rev. Stat. sec. 563, cl. 6; ib. sec. 3491.

ib. sec. 629, cl. 4.

²⁷ U. S. Stat. sec. 563, cl. 7; ib.

²⁵ U. S. Rev. Stat. secs. 3490 and sec. 629, cl. 4.

when proceedings at law for the collection of such judgment have proved unavailing.²⁸

§ 623. **Jurisdiction of seizures on land and waters not navigable.**—The district courts, sitting as courts of common law, have jurisdiction “of all seizures on land, and on waters not within the admiralty and maritime jurisdiction”—that is, on waters not navigable. Such seizures are proceedings at common law, and in them the court sits as a court of common law, and proceeds as such, according to the course of the English exchequer on information *in rem*, and the trial of all issues of fact is by jury; and the judgment of the court is reviewed by the appellate courts on writ of error only, and not on appeal.²⁹

§ 624. **Condemnation of property used in aid of insurrection.**—The district courts, (1) as courts of common law when the seizure is on land or on waters not navigable, and (2) as prize courts in admiralty when the seizure is on navigable waters, have jurisdiction of proceedings to condemn any property, real or personal, used in aid of any insurrection against the government of the United States;³⁰ and proceedings for

²⁸ U. S. Rev. Stat. sec. 382; 4 Fed. Stat. Anno. 773; U. S. Comp. Stat. 1901, p. 213.

²⁹ 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73, 79; U. S. Rev. Stat. sec. 563, cl. 8; *The Sarah*, 8 Wheat. 391, 396 (5:644); *Morris v. United States*, 8 Wall. 507, 512 (19:481); *Friedenstein v. U. S.*, 125 U. S. 224, 240 (31:736); *Origet v. U. S.*, 125 U. S. 240 247 (31:743); *Lillenthal v. U. S.* 97 U. S. 237, 272 (24:901); *U. S. v. 16 Hogsheads Tobacco*, 2 Bond, 137, Fed. Cas. 16,302; *U. S. v. One Distillery*, 4 Bliss, 26, Fed. Cas. 15,929; *U. S. v. 396 Bbls. Distilled Spirits*, Int. Rev. Rec. 114, Fed. Cas. 16,502; *U. S. v. 1150½ Pounds Celluloid*, 82 Fed. R. 627.

“Where the seizure is made on navigable waters, within the 9th Section of the Judiciary Act, the case belongs to the instance side

of the district court; but where the seizure is made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

“Seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burden, are exclusively cognizable in the district courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this (the supreme) court by writ of error.” —Clifford, Justice, in *Morris v. U. S.*, *supra*.

³⁰ U. S. Rev. Stat. 563, cl. 9;

the condemnation of such property captured whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.³¹

§ 625: **Suits by assignees of debentures.**—The district courts have jurisdiction, concurrent with the circuit courts, of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.³²

§ 626. **Suits for injuries resulting from conspiracies in violation of the "Civil Rights" Act.**—The district courts have jurisdiction, concurrent with the circuit courts, and exclusive of the state courts, of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by an act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty of the United States revised Statutes, title, "Civil Rights."³³

§ 627. **Same—Certain provisions of the "Civil Rights" legislation declared unconstitutional.**—It was provided by sections one and two of the act of March 1, 1875, entitled "an act to protect all citizens in their civil and legal rights," that: all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of pub-

U. S. Rev. Stat. sec. 629, cl. 6;
U. S. Rev. Stat. sec. 5308; 18 U.
S. Stat. at L. ch. 80, sec. 1, p. 317;
Union Ins. Co. v. U. S., 6 Wall.
759, 766 (18:879); Armstrong
Foundry v. U. S., 6 Wall. 766, 770
(18:882); The St. Louis Street
Foundry v. U. S., 6 Wall. 770
(18:884); Confiscation Cases, 7
Wall. 454, 463 (19:196); Morris v.
U. S., 8 Wall. 507, 512 (19:481);
4 Fed. Stat. Anno. 234; U. S.
Comp. Stat. 1901, pp. 457, 3614; U.

S. v. Stevenson, 3 Ben. 119, Fed.
Cas. 16,396; Titus v. U. S., 20
Wall. 475, 485 (22:400).

³¹ U. S. Rev. Stat. sec. 735; 6
Fed. Stat. Anno. 70.

³² Rev. Stat. sec. 563, cl. 10; sec.
629, cl. 8.

³³ U. S. Rev. Stat. sec. 563, cl.
11; ib. sec. 629, cl. 17; ib. sec.
1980; 18 U. S. Stat. at L. ch. 114,
sec. 3, p. 335; 4 Fed. Stat. Anno.
234, 250.

lic amusement, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color regardless of any previous condition of servitude; and that persons denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated, or should aid or incite such denial, should forfeit and pay to the aggrieved person the sum of five hundred dollars to be recovered in an action of debt with costs, and should also be guilty of a misdemeanor and liable to fine or imprisonment.³⁴ These provisions were held unconstitutional and void, upon the ground that the fourteenth amendment is an inhibition upon the states, and does not authorize congress to create a code of municipal laws for the regulation of private rights, and that the thirteenth amendment relates only to slavery and involuntary servitude, and by its own unaided force abolishes slavery and establishes universal freedom, and the denial of equal accommodations in inns, public conveyances and places of public amusement imposes no badge of slavery upon the aggrieved party.³⁵

§ 628. Suits to redress deprivation of rights secured by constitution and laws of the United States.—The district courts have jurisdiction, concurrent with the circuit courts, but exclusive of the state courts, of all suits at law or in equity authorized by law ³⁶ to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the constitution of the United States, or of any right secured by any law of the United States to any person within the jurisdiction thereof.³⁷ The jurisdiction here given is evidently based on section nineteen hundred and seventy-nine of the Revised Statutes, and it seems doubtful whether that section is now in force.³⁸

³⁴ 18 U. S. Stat. at L. ch. 114, secs. 1 and 2 p. 335.

³⁵ Civil Rights Cases, 109 U. S. 3, 62 (27:839).

³⁶ U. S. Rev. Stat. sec. 1979.

³⁷ U. S. Rev. Stat. sec. 563, cl. 12; U. S. Rev. Stat. sec. 629, cl. 16; 18 U. S. Stat. at L. ch. 114,

sec. 3, p. 335; 4 Fed. Stat. Anno. 234, 249; 1 Fed. Stat. Anno. 805, 806, 807; U. S. Stat. Comp. 1901, pp. 506, 507.

³⁸ *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 73 (44:374).

NOTE.—*Repealed Statutes*: The legislation upon which clauses 13

§ 629. **Suits brought by aliens for torts in violation of the law of nations and treaties.**—The ninth section of the original judiciary act provides that the district courts “shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”³⁹ The revised statutes omit the clause—“concurrent with the courts of the several states, or the circuit courts, as the case may be.”⁴⁰

§ 630. **Same—When the original act may be looked to in aid of construction.**—The original judiciary act, and many other federal statutes, were badly mutilated in the revision, and, in consequence, it is sometimes necessary to refer to the original act to ascertain the meaning, and the supreme court

and 14 of sec. 563 giving jurisdiction to the district court, and clauses 13 and 14 of sec. 629, giving jurisdiction to the circuit courts has been repealed, and the jurisdiction mentioned in those clauses no longer exists. See the following: 28 U. S. Stat. at L., ch. 25. pp. 36, 37, entitled “an act to repeal all statutes relating to supervisors of elections and special deputy marshals, and other purposes.” That act repeals the following sections of the U. S. Rev. Statutes, viz.: 2002, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 5506, 5511, 5512, 5513, 5514, 5515, 5520, 5521, 5522, 5523; and “all other statutes and parts of statutes relating in any manner to supervisors of election and special deputy marshals” were repealed by that act, which was approved Feb. 8, 1894.

See also U. S. Comp. Stat. 1901, 1271–1273.

See also 30 U. S. Stat. at L. ch. 389, p. 432; U. S. Comp. Stat. 1901,

459, 1202, referring to statutes removing disabilities imposed by section 3 of the Fourteenth Amendment to the Constitution.

Suits Against National Banks. It is also to be noted that clause 15 of sec. 563, and clause 10 of sec. 629 of the U. S. Rev. Statutes, giving the circuit and district courts jurisdiction of suits by and against national banks without regard to citizenship or the amount in controversy, were repealed by Act of Aug. 13, 1888, ch. 866, which provides that such banks for the purposes of all suits by or against them shall be deemed citizens of the states in which they are respectively located, and the circuit and district courts shall not have jurisdiction in suits by and against them other than such as they would have in cases between individual citizens. 25 U. S. Stat. at L. 436; 5 Fed. Stat. Anno. 193, 194.

³⁹ 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73–79.

⁴⁰ U. S. Rev. Stat. sec. 563, cl. 16; 4 Fed. Stat. Anno. 235.

has laid down some rules, defining the circumstances under which such resort may be had. They are as follows:

(1) The Revised Statutes of the United States must be treated as a legislative declaration by congress of the statute law on the subjects which they embrace, on the first day of December, 1873; and when the meaning is plain, the courts cannot look to the statutes which have been revised to see if congress has erred in its revision. (2) But when it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning, the original statute may be resorted to for ascertaining that meaning.⁴¹ (3) Under the rule that the original statute may be resorted to for the purpose of ascertaining the meaning of the revision, where there is a substantial doubt as to the meaning of revision, the title of the original act may be resorted to, even if the text of the revision be the same as the original.⁴² (4) It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.⁴³ (5) Upon a revision of statutes, where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology will not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change.⁴⁴

§ 631. Suits against consuls and vice-consuls.—The ninth section of the original judiciary act declares that the district courts “shall also have jurisdiction exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid;” the exception referring to a previous provision in the same section which declares “that the district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the

⁴¹ United States v. Bowen, 100 U. S. 508 (25:631); Victor v. Arthur, 104 U. S. 498 (26:633); Arthur v. Dodge, 101 U. S. 36 (25:949); Cambria Iron Co. v. Ashbum, 118 U. S. 57 (30:61); United States v. Averill, 130 U. S. 339 (32:978).

⁴² Meyer v. Western Car Co., 102 U. S. 1 (26:59).

⁴³ United States v. Ryder, 110 U. S. 729 (28:308).

⁴⁴ McDonald v. Hovey, 110 U. S. 619 (28:269).

United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars or a term of imprisonment not exceeding six months, is to be inflicted.”⁴⁵ The constitutional grant to the supreme court of original jurisdiction “in all cases affecting ambassadors, other public ministers and consuls” is not exclusive, and the legislation of congress has been effectual to vest in the district courts criminal and civil jurisdiction in cases against consuls and vice-consuls.⁴⁶

§ 632. **Suits against the government under “The Tucker Act.”**—The district courts are, by the Tucker Act, given jurisdiction, concurrent with the court of claims, to hear and determine all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable, where the amount of the claim does not exceed one thousand dollars; and the circuit courts are given concurrent jurisdiction in all such cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. But it is provided in the act that it shall not be construed as giving to either of said courts jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as war claims, or to hear and determine other claims which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same. And by an amendment of the act, it is provided that no suit against the government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under the act

⁴⁵ 1 U. S. Stat. at L. ch. 20, sec. 9, pp. 73-79; U. S. Rev. Stat. sec. 563, cl. 17; 4 Fed. Stat. Anno. 235, 236. 263 (28:419); *Glittings v. Crawford*, Taney 1, Fed. Cas. 5,465; *Ex parte Balz*, 135 U. S. 403, 432 (34:222).

⁴⁶ *Bors v. Preston*, 111 U. S. 252.

unless an account of said fees shall have been rendered and finally acted upon according to the provisions of the act of July thirty-first, eighteen hundred and ninety-four (chapter one hundred and seventy-four, twenty-eight Statutes at Large, page one hundred and sixty-two), unless the proper accounting officer of the treasury fails to finally act thereon within six months after the account is received in said office; and that the jurisdiction conferred by the act upon the circuit and district courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof.⁴⁷

§ 633. **Same—Set-offs and counter-claims.**—In all suits mentioned in the section next preceding, over which the circuit and district courts are given jurisdiction, the said courts have, also, jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said courts.⁴⁸

§ 634. **Same—Limitation of suits—Six years.**—No suit against the government of the United States shall be allowed under the Tucker Act, unless the same shall have been brought within six years after the right accrued for which the claim is made.⁴⁹

§ 635. **Same—Cases “sounding in tort” excluded by “The Tucker Act.”**—The “Tucker Act” clearly excludes from judicial cognizance any claim against the United States for damages in a case “sounding in tort.” The United States cannot be sued without their consent, and they have never permitted themselves to be sued, for the torts, misconduct, misfeasance or laches of their officers or employes; and the settled distinction between actions *ex contractu* and actions *ex delicto* cannot be evaded by framing pleadings upon a pretended theory of waiving the tort and suing on an implied contract.⁵⁰

⁴⁷ 24 U. S. Stat. at L. ch. 359, pp. 505–508; 30 U. S. Stat. at L. ch. 503, pp. 494, 495 and ch. 546, sec. 2, pp. 649, 650; 28 U. S. Stat. at L. ch. 174, p. 162; 2 Fed. Stat. Anno. 80–88; U. S. Comp. Stat. 1901, pp. 752–758.

⁴⁸ 24 U. S. Stat. at L. ch. 359, p. 505; 2 Fed. Stat. Anno. 81; U. S. Stat. Comp. 1901, pp. 752, 753.

⁴⁹ 24 U. S. Stat. at L. ch. 359, sec. 1, p. 505; 2 Fed. Stat. Anno. 81; U. S. Comp. Stat. 1901, p. 752.

⁵⁰ *Bigby v. United States*, 188 U.

§ 636. **Same—Four classes of cases contemplated by “The Tucker Act.”**—The first section of the act contemplates four distinct classes of cases, viz: (1) Those founded on the constitution or any law of congress, with an exception of pension cases; (2) cases founded on any regulation of an executive department; (3) cases of contract, express or implied, with the government; and (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words “not sounding in tort” are in terms referable only to the fourth class of cases.⁵¹

§ 637. **Same—Same—Implied contracts.**—The rule deducible from the adjudicated cases is, that whenever the government appropriates property which it does not claim as its own, but concedes it to be the property of an individual, it does so under an implied contract that it will pay to the owner the value of the property so appropriated, and a suit may be maintained for it under the act now being considered.⁵² An action to recover back import duties illegally exacted and paid under protest is a case founded upon an act of congress within the meaning of the “Tucker Act,” and is within the jurisdiction of the circuit and district courts, as courts of claims.⁵³

§ 638. **Same—Suit by marshal to recover disbursements made to pay court bailiffs.**—A suit by a United States marshal to recover from the United States money disbursed by him in paying for the services of bailiffs in the district and circuit courts, is not a suit “brought to recover fees, salaries or compensation for official services of officers of the United States” within the meaning of the section of the amendatory act of the “Tucker Act,” and such suit is within the jurisdiction conferred by that act upon the circuit and district courts.⁵⁴ Bailiffs are not officers of the United States, but are merely officers of the court.⁵⁵

S. 400, 410 (47:519); *Hill v. United States*, 149 U. S. 593, 605 (37:862); *Schillinger v. United States*, 155 U. S. 162, 180 (39:108).

⁵¹ *Dooley v. United States*, 182 U. S. 222, 243 (45:1074); *United States v. Palmer*, 128 U. S. 262, 272 (32:442); *United States v. Lynah*, 188 U. S. 445, 485 (47:539).

⁵² *United States v. Lynah*, 188 U. S. 445, 485 (47:539); *United States v. Palmer*, 128 U. S. 262, 272 (32:442).

⁵³ *Dooley v. United States*, 182 U. S. 222, 243 (45:1074).

⁵⁴ *United States v. Swift (C. C. A.)*, 139 Fed. R. 225, 230.

⁵⁵ *United States v. McCabe*, 129

§ 639. **Same—Suit for salvage where the government is benefited by the salvage service.**—Jurisdiction is conferred by the “Tucker Act” of a suit for salvage where the government has been benefited by the salvage service; and, where the government has a lien on merchandise for the payment of custom duties, and those duties have been paid under a statute which requires that they shall be refunded in the event of the destruction, in whole or in part, of the merchandise, by accidental fire or other casualty, while they remain in the custody of the officers of the customs in any public or private warehouse under bond, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, and salvage services are rendered which prevent the destruction of the merchandise by accidental fire under the circumstances enumerated in the statute, the government is held to be benefited by such services, and the court has jurisdiction of a suit to recover for them.⁵⁶

§ 640. **Jurisdiction of judicial proceedings by the federal government to condemn private property for public use.**—The federal government is, within the sphere of action appropriated to it by the constitution, sovereign, independent, and supreme,⁵⁷ and is, by virtue of its sovereignty, and as an attribute thereof, vested with the full and complete power of eminent domain, which it may exercise, within constitutional limits, not only within the territories and the District of Columbia, which are subject to its exclusive jurisdiction, but also within the several states, without their concurrence or consent, whenever it may be necessary or appropriate in the exercise of any power vested in it by the constitution;⁵⁸ and the district

Fed. 708, 64 C. C. A. 236; *United States v. Swift*, 139 Fed. R. 225, 230.

⁵⁶ *United States v. Cornell Steamboat Co.* (C. C. A.) 137 Fed. R. 455, 460; *United States v. Morgan*, 99 Fed. R. 570, 39 C. C. A. 653.

⁵⁷ *Ableman v. Booth*, 21 How. 523 (16:175); *United States v. Tarbell*, 13 Wall. 397 (20:597).

⁵⁸ *Kohl v. United States*, 91 U. S. 367, 379 (23:449); *United*

States v. Gettysburg Electric R. Co., 160 U. S. 668, 686 (40:579); *Chappell v. United States*, 160 U. S. 499, 514 (40:510); *Harris v. Elliott*, 10 Pet. 25 (9:333); *United States v. Jones*, 109 U. S. 513 (27:1015); *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525–531 (29:264, 266); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 656 (34:295, 301); *Monongahela Nav. Co. v. United States* 148 U. S. 312 (37:463); *Luxton v. North River*

and circuit courts are, by federal statute, vested with concurrent jurisdiction of judicial proceedings for the condemnation of private property needed by the government for any public use authorized by the constitution and valid laws of the United States.⁵⁹

§ 641. Same—A proceeding to condemn private property for public use is a suit at common law.—A judicial proceeding to condemn private property for public use is, within the meaning of the constitution and judiciary and removal acts of the United States, a suit at common law;⁶⁰ and the general rule is that the trial of issues of fact in actions at law, both in the district and circuit courts shall be by jury, by which is meant a trial by an ordinary jury at the bar of the court, and congress has not provided any peculiar mode of trial in proceedings for the condemnation of lands for public use, and the direction of the federal statute that such proceedings shall conform, “as near as may be,” to those “in the courts of record in the state,” is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way either of preliminary, or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge, as such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States.⁶¹

Bridge. Co., 147 U. S. 337 (37:194); S. C., 153 U. S. 525 (38:808) Burt v. Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; Re United States, 96 N. Y. 227.

⁵⁹ U. S. Rev. Stat. secs. 4870–4882; 25 U. S. Stat. at L. ch. 129, p. 94, and ch. 728, p. 357; 26 U. S. Stat. at L. ch. 797, sec. 1, pp. 315, 316, and ch. 837, sec. 2, p. 412; 4 Fed. Stat. Anno. 700 et. seq.; U. S. Comp. Stat. 1901, pp. 2516, 2518, 3375, 3376, 3525.

⁶⁰ Kohl v. United States, 91 U. S. 367, 379 (23:449); Searl v. School Dist., 124 U. S. 197, 200 (31:415); Chappell v. United States, 160 U. S. 490, 514 (40:510).

⁶¹ Chappell v. United States, 160 U. S. 490, 514 (40:570).

“When, in the 11th section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights are to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute.” Strong, Justice, in Kohl v. United States, *supra*.

§ 642. **Jurisdiction of suits under the act to prevent unlawful occupancy of the public lands.**—The district and circuit courts have concurrent jurisdiction of civil suits in the name of the United States for the recovery of the possession of their public lands held by persons or corporations in violation of the act of congress, entitled “an act to prevent unlawful occupancy of the public lands.”⁶² This statute was intended to operate upon mere trespassers who take possession of the public lands without shadow of title, and not upon persons who take possession under a *bona fide* claim or color of title; and the civil suit authorized by it to be brought is not a common-law action, but a summary proceeding in the nature of a suit in equity, and the decree authorized by the act to be entered in such suit for the abatement of enclosure around public lands is unknown as an action at common law as administered in this country, and may be reviewed on appeal rather than upon writ of error.⁶³

§ 643. **Jurisdiction of actions for damages under the interstate commerce act.**—The district and circuit courts are vested with concurrent jurisdiction of actions for damages under the interstate commerce act. The ninth section of that act provides “that any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.”⁶⁴ In order to a recovery under this act, the plaintiff must allege distinctly and prove that the defendant carrier has violated the provisions of the act, and that he has, in consequence thereof, suffered special injury.⁶⁵

⁶² 23 U. S. Stat. at L. ch. 149, sec. 9, p. 382; 3 Fed. Stat. Anno. sec. 2, pp. 321, 322; *Camfield v. United States*, 167 U. S. 518, 528 (42:260). 833; 3 U. S. Comp. Stat. 1901, p. 3154.

⁶³ *Cameron v. United States*, 148 U. S. 301, 311 (37: 459).

⁶⁵ *Parsons v. Chicago & Northwestern Ry. Co.*, 167 U. S. 447, 460 (42:231).

⁶⁴ 24 U. S. Stat. at L. ch. 104,

§ 644. **Jurisdiction to issue writs of mandamus to compel equal facilities to shippers.**—The district courts have jurisdiction concurrent with the circuit courts, upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act and amendatory acts to regulate interstate commerce, as prevents the relator from having interstate traffic moved by such common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by such common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against such common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; and if any question of fact as to the proper compensation to the common carrier for the services to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into court, or otherwise, as the court may think proper, pending the determination of the question of fact; and the remedy given by the writ of mandamus is cumulative, and does not exclude or interfere with other remedies provided by the interstate commerce act and amendatory acts.⁶⁶

§ 645. **Same—Foundation of the right to the writ of mandamus.**—The foundation of the right of the relator to the writ of mandamus under this statute is an unjust discrimination, by the defendant common carrier, against the relator in favor of another shipper engaged in like traffic under similar conditions; and the relator must allege such unjust discrimination in the manner required by good pleading, and sustain his allegations by competent evidence, or the writ of mandamus will be denied. The statute requires that the relator shall allege such violation of the act “as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper.” The remedy is

⁶⁶ 25 U. S. Stat. at L. ch. 382, pp. 852, 853; 3 U. S. Comp. Stat. sec. 10, p. 855; 3 Fed. Stat. Anno. 1901, p. 3172.

purely statutory, and the pleadings and proofs of the relator must bring him within the terms and policy of the statute, and failing in this he will not be entitled to the extraordinary remedy furnished by the statute.⁶⁷

§ 646. Same—Same—Purposes of the interstate commerce act.—The principal objects and purposes of the interstate commerce act are to secure just and reasonable charges for transportation, and to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions, and to prevent undue or unreasonable preferences to persons and corporations, or localities, and to inhibit greater compensation for a shorter than for a longer distance over the same line, and to abolish combinations for the pooling of freights. But it was not designed by that legislation to prevent competition between different railroad lines, nor to interfere with the customary arrangements by railway companies for reduced fares in consideration of increased mileage, when such reduction does not operate as an unjust discrimination against other persons over the same road, nor to eliminate the principle that transportation may be sold at wholesale cheaper than at retail.

All discriminations and preferences do not fall within the inhibitions of the statute, but only such as are unjust and unreasonable; and it is also true that a charge for transportation may be perfectly reasonable, and yet may operate as an unjust or unreasonable discrimination against others. When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.⁶⁸

⁶⁷ United States v. Norfolk & W. Ry. Co., 109 Fed. R. 831; United States v. Delaware, L. & W. R. Co., 40 Fed. R. 101.

⁶⁸ Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 284 (36:699); Great

Western R. Co. v. Sutton, L. R. 4 H: L. 226, 239; Interstate Commerce Commission v. Louisville & Nashville R. Co., 73 Fed. R. 409; Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. R. 37.

§ 647. **Same—Plea in abatement—Former suit pending.**—It has been decided on the circuit, that a former proceeding for a writ of mandamus under this statute, in the same jurisdiction, resulting in a final judgment denying the writ to the relator, to revise which judgment a writ of error is pending and undetermined in an appellate court, may be pleaded in abatement of a subsequent proceeding for a writ of mandamus between the same parties, and involving the same subject-matter.⁶⁹

§ 648. **Same—Increased jurisdiction of the district courts by the last amendment to the act.**—The last amendment to the act to regulate commerce provides: “that the circuit and district courts of the United States shall have jurisdiction, upon the application of the attorney-general of the United States, at the request of the commission, alleging failure to comply with or a violation of any of the provisions of said act to regulate commerce, or of any act supplementary thereto, or amendatory thereof, by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them.”⁷⁰

The late amendment also provides for many pecuniary penalties and forfeitures, to be recovered in any court of the United States of competent jurisdiction; and the revised statutes giving the district courts jurisdiction “of all suits for penalties and forfeitures incurred under any law of the United States,” is effectual to vest those courts with jurisdiction of all suits to recover penalties and forfeitures under the act to regulate commerce, and all amendments thereto.⁷¹

§ 649. **Seizure and destruction of obscene books, pictures and other articles imported from foreign countries in violation of law.**—Any judge of any district or circuit court, within the proper district, before whom complaint is made in writing on oath, founded upon knowledge or belief, and if upon belief setting forth the grounds of such belief, that there has been imported into this country from a foreign country, in

⁶⁹ United States v. Norfolk & W. R. Co., 114 Fed. R. 683.

⁷⁰ 34 U. S. Stat. at L. ch. 3591, sec. 6 (adding sec. 16a to the act

to regulate commerce) pp. 592, 593.

⁷¹ U. S. Rev. Stat. sec. 563, cl. 3; 4 Fed. Stat. Anno. 219; 34 U. S. Stat. at L. ch. 3591, pp. 584–595.

violation of the federal statutes, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket or any advertisement of any lottery, may issue, conformably to the constitution, a warrant directed to the marshal or any deputy marshal in the proper district, directing him to search for, seize, and take possession of any such article or thing mentioned aforesaid, and to make an immediate return thereof to the end that the same may be condemned and destroyed by proceedings which shall be conducted in the same manner as other proceedings in the case of municipal seizure, and with the same right of appeal or writ of error.⁷²

§ 650. **Jurisdiction of actions to recover penalties for violations of The Safety Appliances Act.**—The district courts are vested with jurisdiction of actions of debt for the recovery of penalties for violations of the act of congress “to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes.” This act makes it unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose, or to haul or to permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars, or to use any car in interstate commerce that is not

⁷² 30 U. S. Stat. at L. ch. 11, secs. 16, 17, 18, pp. 208, 209; 3 Fed. Stat. Anno. 317, 318, 319.

provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars; and the act imposes upon the carrier a penalty of one hundred dollars for each and every violation of the provisions of the act, to be recovered in a suit or suits by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed.⁷³

§ 651. Jurisdiction of suits pending in territorial courts upon admission of the territory as a state.—It is provided by federal legislation that, when any territory is admitted into the Union as a state, and a district court is established therein, such district court shall take cognizance of all cases which were pending and undetermined in the superior court of such territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the supreme court, and shall proceed to hear and determine the same;⁷⁴ and all the records of the proceedings in such cases, and all the records of the proceedings in like cases in which judgments or decrees shall have been rendered in such territorial courts before the time of its admission as a state, shall be transferred to and deposited in the district court for such state;⁷⁵ and it shall be the duty of the district judge to demand of the clerk, or other person, having possession or custody of the records of the above mentioned class of cases, the delivery thereof, to be deposited in said district court, and in case of the refusal of such clerk or person to comply with such demand, the district judge shall compel the delivery of such records by attachment, or otherwise, according to law.⁷⁶

§ 652. All issues of fact in actions at law tried by jury.—In the district courts of the United States, in actions at common

⁷³ 27 U. S. Stat. at L. ch. 196, p. 531; 29 U. S. Stat. at L. ch. 87, p. 85; 6 Fed. Stat. Anno. pp. 752-753; 32 U. S. Stat. at L. ch. 976, pp. 943-944.

⁷⁴ U. S. Rev. Stat. Sec. 569; 4 Fed. Stat. Anno. 238; 1 U. S. Comp. Stat. 1901, 462; Benner v. Porter, 9 How. 234 (13:119); For-

syth v. United States, 9 How. 571 (13:262); McNulty v. Batty, 10 How. 78, 80 (13:335).

⁷⁵ U. S. Rev. Stat. sec. 567; 4 Fed. Stat. Anno. 237; 1 U. S. Comp. Stat. 1901, 462.

⁷⁶ U. S. Rev. Stat. sec. 568; 4 Fed. Stat. Anno. 238; 1 U. S. Comp. Stat. 1901, 462.

law, all issues of fact are tried by a jury;⁷⁷ and there is no provision of law authorizing the waiving of a jury, and a trial of issues of fact, in an action at common law, in those courts, by the court, the federal statutes upon that subject applying to the circuit courts only.⁷⁸

⁷⁷ U. S. Rev. Stat. sec. 566; 4 Fed. Stat. Anno. 236; 1 U. S. Comp. Stat. 1901, 461.

⁷⁸ Rogers v. U. S., 141 U. S. 548, 556 (35:853); 4 Fed. Stat. Anno. 236, 237, collecting authorities.

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